UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

E.I. DuPONT de NEMOURS & CO., INC.

and CASE 3–CA–23449

NIAGARA PLANT EMPLOYEES UNION

and CASES 3–CA–23797–1
3–CA–23797–2
3–CA–24100

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS, LOCAL 1-5025

Ron Scott, Esq., for the General Counsel.

James D. Donathen, Esq. *(Phillips, Lytle, Hitchcock, Blaine & Huber, LLP)*, of Buffalo, New York, and *Steven W. Suflas, Esq. (Ballard, Spahr, Andrews & Ingersoll, LLP)*, *of Voorhees, New Jersey (Laura H. Huggett, Esq.,* of Wilmington, Delaware, on the brief*)*, for Respondent.

Kathleen Hostetler, Esq., of Denver, Colorado, for the Charging Party.

DECISION

Findings of Fact and Conclusions of Law

Benjamin Schlesinger, Administrative Law Judge. With the exception of the minor discipline of one employee, this is essentially a Section 8(a)(5) case in which Respondent E.I. DuPont de Nemours & Co., Inc., is charged with unilaterally discontinuing one of its products, molded sodium, and in effect subcontracting it; refusing to bargain to completion regarding the closure of another of its operations, the production of Terathane; prematurely and unilaterally implementing changes in the terms and conditions of employment of its employees; refusing to furnish information and documents necessary to Paper, Allied-Industrial, Chemical and Energy Workers, Local 1-5025 (Union), and its predecessor, Niagara Plant Employees Union (NPEU), to bargain intelligently; and refusing to permit an inspection of its plant. Respondent denies that it violated the Act in any manner.[1]

[1] NPEU filed the unfair labor practice charge in Case 3–CA–23449 on January 17, 2002, and amended it on March 27 and April 15, 2002. On September 4, 2002, the Union filed unfair labor practice charges in Cases 3–CA–23797–1 and 3–CA–23797–2, the latter being amended on October 23, 2002. On February 19, 2003, the Union filed a charge in Case 3–CA–24100, and the third consolidated

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Respondent, a corporation with an office and place of business in Niagara Falls, New York (often referred to in the record as the Niagara plant, or simply Niagara), where it has been engaged in the manufacture of chemical products, annually purchases and receives at that facility goods valued in excess of $50,000 directly from points outside the State of New York. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, I also conclude that NPEU and the Union are labor organizations within the meaning of Section 2(5) of the Act, with which Respondent has had an "evergreen" collective-bargaining agreement since at least March 4, 1983, the date of its current agreement, which was for a term of one year but has automatically renewed from year to year, neither party having notified the other of its desire to bargain new terms.[2]

Molded Sodium and the Lantai Agreement

At its Niagara facility, Respondent is the sole sodium manufacturer in the United States. Before August 2001, Respondent, in one area of its facility, the Reactive Metal business, produced sodium, both in bulk and molded in blocks or bricks, and lithium and chlorine, utilizing a process in which either sodium chloride (salt) or lithium chloride was placed into large cells and, through electrolysis, using huge amounts of electricity, the chlorine was separated from the sodium or lithium. The chlorine was sold to another company, the Olin Corporation. A minor portion of the sodium (eight or nine percent in 2000, and the percentage had been diminishing yearly) was molded into 1- or 5- or 12-pound bricks or ingots, which, after cooling and solidifying, were shipped to customers in 55-gallon drums. The substantial portion of the sodium, the remaining 91 percent or more, was shipped as a molten bulk product.

In early August, Respondent's Sodium Unit Manager, Richard Wallden informed Russell Koithan and Steven Fleury, then Union president and vice-president, respectively, that Respondent had entered into an agreement for the sale of its sodium cell proprietary technical information to a Chinese corporation, Inner Mongolia Lantai Industrial Co., Ltd. (Lantai),[3] and that Respondent planned to cease the production of sodium blocks by January 2002. Wallden explained that the decision was "cost driven" and that Respondent could buy molded sodium cheaper from China than it could produce it itself.[4] In a conference held with Respondent's affected employees on September 7, Plant Manager Kelly Kober reiterated that the Lantai agreement had been made, but added that the agreement gave Respondent "the right to purchase a supply of sodium from Lantai at a cost which is significantly lower than our total incremental cost of sodium produced with street electrical power." The agreement would have no current effect on the employees, but he expected the manpower to change in the future. Management announced at a bargaining session[5] on September 20 that the Lantai negotiations were "ongoing," but it had not yet determined whether Lantai was "going to do bulk," the implication being that Lantai was going to produce sodium blocks. A question by the Union at a

complaint issued on April 11, 2003. The hearing was held in Buffalo, New York, on 10 days between April 28, 2003, and July 17, 2003.

[2] An "evergreen contract" "renews itself from one term to the next in the absence of contrary notice by one of the parties." Black's Law Dictionary, 7th ed. at 321 (West 1999).

[3] Inner Mongolia Jilantai Salt Chemical Group Company, the purchase agent to Lantai, was also party to the agreement.

[4] Only Fleury testified that Wallden added that Respondent intended to buy back sodium blocks from Lantai, as soon as Lantai was capable of producing them. Koithan specifically denied it, and the other documented statements of Respondent make improbable Fleury's testimony, which I discredit.

[5] Bargaining and negotiations occurred under different guises, with the parties being represented by different committees, having essentially the same composition, such as wage and hour, policy, or contract committees.

negotiating session held on September 20—"The Union asked if bulk or just molding would be part of the sale"—indicates that the Union understood that Lantai would be producing molded sodium. And, of course, Respondent would not; and Respondent would buy from Lantai the molded sodium that it was no longer producing, which is exactly what happened.

The complaint alleges that this was no more than a subcontracting arrangement with Lantai, that is, that Respondent would cease production of molded sodium but would buy it from Lantai, who would make it for Respondent in place of Respondent's employees. As such Respondent's failure to give the Union advance notice of its plans and to bargain about this decision violated Section 8(a)(5) and (1) of the Act, pursuant to *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), in which the Court found, at 210–211, that: "The inclusion of 'contracting out' within the statutory scope of collective bargaining . . . seems well designed to effectuate the purposes of the National Labor Relations Act." On the other hand, Respondent contends that it ceased manufacturing molded sodium and thus closed part of its business. Under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), it claims that it had no duty to bargain because the burden placed on the conduct of its business outweighed any benefit for labor-management relations and the collective-bargaining process that could arise. 452 U.S. at 679.

The first issue that arises, however, is grounded in the testimony of both Koithan and Fleury, who testified that the Union immediately in August demanded bargaining. Both Wallden and Diane Vespucci, Respondent's human resource specialist, denied that it had done so. The Union never put its demand in writing, and there is nothing in the minutes of any meeting that supports Koithan's and Fleury's position. It is probable that they were mistaken. There is, however, ample evidence that the Union made numerous requests for information, including orally requesting in August and in writing on September 20 a copy of Respondent's agreement with Lantai, about which more below, because, as it contended on September 20, the "sale could strongly impact the site." Respondent admitted then that it "would expect the manpower to change; however, there are currently no plans to cut any operators." The Union's request for the agreement with Lantai, coupled with its discussion of the scope of the agreement and its impact, constituted an implicit demand for bargaining about Respondent's decision to sell its technology to Lantai and to cease producing sodium blocks.

Even if the Union's actions did not constitute such a demand, the record makes evident that Respondent had made its decision regarding molded sodium. It was a fait accompli. Compare *AT&T Corp.*, 337 NLRB 689, 692 fn. 9 (2002). There was nothing, in truth, which the Union could bargain about. In this circumstance, "the Union was not required to request bargaining in order to preserve its rights under the Act." *Dow Jones & Co.*, 318 NLRB 574, 577 (1995), enfd. mem. 100 F.3d 950 (4th Cir. 1996); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *S & I Transportation, Inc.*, 311 NLRB 1388, 1388 fn. 1, 1390 (1993). Thus, contrary to Respondent's contention, there could be no waiver by the Union; a waiver will not be found in the absence of clear notice of an intended change, and here there was none. *Sykel Enterprises*, 324 NLRB 1123 (1997). Here, the change, when announced by Wallden in August, was not *intended*, but *effectuated*. A subsidiary issue, raised by Respondent's affirmative defense, is that the Union's claim that Respondent refused to bargain is time-barred by Section 10(b). Respondent's sole support is that there is no evidence in the record that the Union ever asked to bargain over Respondent's decision to purchase products from Lantai until the issuance of the complaint. In light of my disposition that such a request would have been futile, this defense has no substance. Furthermore, the original charge in Case 3-CA-23449 alleging this violation was filed on January 17, 2002, well within six months of the August date that Respondent advised the Union of the Lantai agreement.

The second issue concerns the nature of Respondent's business. Although Respondent eventually ceased producing molded sodium, it never stopped selling it. In 2001, it had an excess of inventory and produced with its own employees sufficient bricks through the end of that year to increase its inventory. As late as April 30, 2002, Respondent had not purchased molded sodium from Lantai, because it continued to produce molded sodium in 2002, but only 35 percent of what it had produced in 2001. The record does not reveal when it stopped production or made its first purchase from Lantai; but, by the end of 2002, it had purchased molded sodium from Lantai, about 18 percent of what it had produced that year, for resale to other customers. By 2003, Respondent produced no molded sodium, but purchased from Lantai and sold during the first three months an amount, averaged out, equivalent to 69 percent of its total sales of molded sodium in 2002 and 40 percent of its total sales in 2001—an amount it was able to produce in two and one-half months had it been working at full production with its own employees.

The gist of the General Counsel's complaint is that Respondent never ceased *selling* molded sodium. It ceased only production of that product, while purchasing it from Lantai for resale to Respondent's customers, both domestically and globally, at a cost that was substantially less than its cost would have been had it produced the same product at its Niagara plant. Instead of Respondent's employees working on the end product, Lantai's workers produced the same type of molded sodium that had been produced by Respondent's bargaining-unit employees, using Respondent's technology. That smacks of subcontracting, where one group of employees replaces another group of employees to produce the same product; and the complaint alleges that Respondent's decision to subcontract required bargaining.

The seminal legal authority is *Fibreboard*, which involved a decision to subcontract maintenance work which was previously performed by unit employees. The employer's basic operation was otherwise not altered. The maintenance work still had to be performed in the plant. The employer contemplated no capital investment. The employer "merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." 379 U.S. at 213. In fact, the Supreme Court emphasized that the employer's decision was based on its desire to reduce labor costs, which it considered a matter "peculiarly suitable for resolution" within the framework of collective bargaining. 379 U.S. at 213–214.

Seventeen years later, in *First National Maintenance*, the Court considered the duty of an employer engaged in housekeeping, cleaning, and maintenance work to bargain about its decision to terminate a contract to provide such services to a nursing home, which refused to pay the fee that the employer wanted. Despite the fact that the employer's decision resulted in the loss of employment of those employees who had worked at the nursing home, the Court held that certain types of managerial decisions could be made without bargaining about the decision, even if it had a direct affect on employment, if the decision involved a change in the scope and direction of the enterprise. The employer's "need to operate freely outweigh[ed] the incremental benefit that might be gained through the union's participation in making the decision," the Court noting in footnote 22: "[W]e of course intimate no view as to other types of management decisions such as plant relocations, sales, other kinds of subcontracting, automation etc., which are to be considered on the particular facts."

The Board considered an employer's decision to relocate in *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. in relevant part sub nom. *Food & Commercial Workers Local 150-A v. NLRB,* 1 F.3d 24 (D.C. Cir. 1993), and arrived at the following test:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

With *Dubuque Packing*, we thus have answers to the application of Section 8(a)(5) in three types of employer decisions: simple subcontracting (*Fibreboard*), closure of part of a business (*First National Maintenance*), and relocation (*Dubuque Packing*). In *Torrington Industries*, 307 NLRB 809 (1992), the employer unilaterally replaced two union truck drivers with non-bargaining unit drivers and independent contractor haulers, but claimed that its decision was entrepreneurial and did not turn on labor costs. The Board held that the employer's decision was not entrepreneurial, quoting Justice Stewart's explanation in his concurring opinion in *Fibreboard*, 379 U.S. at 224, that "all that is involved is the substitution of one group of workers for another to perform the same work in the same plant under the ultimate control of the same employer." In such an instance, "there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is." *Torrington Industries*, 307 NLRB at 810; *Overnite Transportation Co.*, 330 NLRB 1275, 1276–1277 (2000), enfd. in part, enf. denied in part. mem. 248 F.3d 1131 (3rd Cir. 2000).

The Board in *Torrington Industries* found that the employer had not changed the scope and direction of its business, noting first that the two employees were "simply replaced," and their discharges were "thus not the result of an elimination of the type of work they performed." 307 NLRB at 810. "It did not, for example, close down its Oneida operation." Id. Second, the Board found that the employer had "not shown that the reasons it gave for the layoffs and subsequent reallocation of the work to others involve entrepreneurial decisions that are outside the range of bargaining." Id. Bargaining, for example, would not require the employer to make any "substantial commitment of capital" or to "change . . . the scope of [its] business." 307 NLRB at 811. The majority of the Board rejected the contention of the concurring Member that it was fashioning a per se rule. Rather, it noted that it was dealing with a case factually similar to *Fiberboard*, "in which virtually all that is changed through the subcontracting is the identity of the employees doing the work." Id.; footnote omitted. It distinguished *Dubuque* and its "labor cost concession" test, which it refused to apply, because plant relocation decisions went well beyond the mere replacement of one set of employees by another. 307 NLRB at 811 fn. 14.

Nonetheless, in *Torrington Industries,* the Board stated in dicta, 307 NLRB 810, that "there may be cases in which the nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining." Accord: *Overnite Transportation*, 330 NLRB at 1276. Such cases involve situations in which the employer's proffered reason for the subcontracting decision involves some change in the "scope and direction" of its business—matters of core entrepreneurial concerns—and, thus, outside of

the scope of bargaining. *First National Maintenance*, 452 U.S. at 667. And, as in *Torrington Industries,* the Board has examined an employer's reasons to determine whether there has been a change in its scope and direction. *Dorsey Trailers, Inc.*, 321 NLRB 616 (1996), modified 322 NLRB 181 (1996), enf. denied in part 134 F.3d 125 (3d Cir. 1998).

Here, Respondent changed its business's scope and direction. The cessation of molded sodium production resulted in the elimination of one of Respondent's four products, leaving bulk sodium, lithium, and chlorine remaining. The reason for the cessation was not to lower labor costs: it was to devote all of its production facilities to bulk products and eliminate a product line which was unprofitable. Otherwise, the process of obtaining the byproducts from salt remained the same; and the processing facility for obtaining sodium was fully utilized. What was not performed by Respondent was at the end of the process.[6] The bulk sodium continued to be placed in tank cars and transported in a heated liquid state to Respondent's customers. No longer, however, was molten sodium pumped into trays, not unlike those for making ice cubes, and, once cooled and solidified, removed by hand, cut to the proper weight to customer specifications by hand and stacked in 55 gallon drums by hand. That job had been performed by four sodium relief operators (SROs) on a part-time basis. Normally only one operator was utilized at any time when the molding room was in operation; and, between 1998 and 2001, the molding room was in operation no more than one-third of the time, so no employee molded all the time, but that was one of several tasks the SROs rotated through in the course of a day or a week.

In other words, the major cost factors involved in the manufacture of sodium blocks did not come from labor, which was minor. Respondent, by exercising its right to purchase molded sodium from Lantai, which was an independent manufacturer of sodium, acted as a middleman or retailer, and not really as a contractor subcontracting its work,[7] and was ultimately able to resell molded sodium to its customers, both domestic and global, at a substantially lower cost than it would have been able to had it produced the same product at its Niagara facility. There is no indication in the record what Respondent's profits from its purchases and sales of molded sodium were, but even minimal profits would have been far better than the losses that Respondent had been incurring for a number of years. Indeed, the Union was well aware that Respondent was losing money producing molded sodium. Respondent advised the employees at meetings in February 2001 that it projected for that year an after-tax operating loss for molded sodium in excess of almost a million dollars. The loss actually incurred for that year was more. Unless the wages and benefits of the four SRO's averaged well in excess of one-quarter million dollars, without even considering that they worked only part-time on molded sodium[8]—and I find that their wages did not—there was nothing that the Union could have bargained about that would have affected Respondent's determination to cease operating this minor portion of its business. Even if Niagara employees were to work for free, Respondent could not

[6] Because of this fundamental change in the direction of Respondent's business to produce solely bulk sodium, *Pertec Computer Corp.*, 284 NLRB 810 (1987), supplemented sub nom. *Triumph-Adler-Royal*, 298 NLRB 609 (1990), enfd. in relevant part sub nom. *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181 (2nd Cir. 1991), cert. denied sub nom. *Auto Workers, Local 376 v. Olivetti Office U.S.A., Inc.*, 502 U.S. 856 (1991), relied on by the General Counsel and the Union, is distinguishable.

[7] There is no evidence that what was sold by Lantai was not its stock item or that Respondent did anything to Lantai's product before reselling it.

[8] The General Counsel's brief states: "It is, however, a fair statement that the rough equivalent of one full-time job was involved."

have produced molded sodium at a price even approaching the lower cost of purchase from Lantai.[9]

In fact, the wages of the four SROs had nothing to do with Respondent's decision. Because Respondent profited from the sale of bulk sodium, which was priced higher, and lost money producing molded sodium, Respondent made a fundamental decision to stay within its "hydroblock," which was the fixed level of electrical power which Respondent agreed in 1963 to purchase for 50 years at extraordinarily low rates. If Respondent exceeded its allocation, it had to purchase power at the then prevailing "street" rate. The normal daily average for street power in 2001 was about 7 to 8 times higher than the hydroblock cost. It made no sense to divert any portion of the hydroblock allocation away from the profitable bulk sodium product and apply the higher electric cost to the molded product, which could not be manufactured profitably even within the hydroblock and which involved more labor, while not fetching the price per pound that Respondent charged for bulk sodium. Furthermore, the molding process was labor intensive; Respondent could not count on a continuous stream of customers for molded sodium, whereas it could for bulk sodium; and the operation was unprofitable, maintained only because it was considered a loss leader, with smaller, entrepreneurial customers whose businesses, Respondent hoped, would grow and eventually progress to bulk product, but did not.

Thus, Respondent put all its emphasis on bulk production, which was more reliable than the intermittent and smaller orders for molded sodium in maintaining the continuation of the production process without pause. That was important because of the nature of Respondent's manufacturing process. Once the salt was placed in one of its 70–72 electrolytic cells to start the manufacture, each cell had to continue to operate and produce sodium; otherwise, once the cell was shut down, it cooled down and froze or solidified, and the product had to be pumped out. Thus, the cell's life was terminated. It had to be torn down and rebuilt. Respondent could rebuild only three or four cells each month. By consequence, it became, from a sales standpoint, very important for Respondent to obtain consumption forecasts from its customers to provide to the plant, so that it could manage its production schedule to operate the correct number of cells to produce the right volume of product. With its emphasis on bulk production, Respondent's task became that much easier. For these reasons, Respondent's decision to cease its production of molded sodium was wholly unrelated to the Lantai agreement and would have occurred regardless of its negotiations with the Chinese.

Furthermore, the agreement was an important component in its successful negotiations to obtain a substantial increase of its bulk sodium business from Rohm & Haas, one of its principal customers,[10] instead of losing it. During the negotiations, on August 15, 2001, Rohm & Haas demanded of Respondent that, in order to justify an increase in Respondent's business, Rohm & Haas had to avoid being "single sourced." Respondent was able to use its sale of its technology to Lantai on August 11 and its ability to purchase bulk sodium from Lantai to guarantee to Rohm & Haas that second source of bulk sodium. The agreement with Lantai thus served an entirely different purpose than a mere subcontract: it vastly increased Respondent's

[9] A number of courts of appeals have concluded that the determination of whether subcontracting decisions must be negotiated should depend on whether labor costs were a factor in making the decision. *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1246–1250 (3d Cir. 1994); *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 185–186 (2d Cir. 1991); *NLRB v. Plymouth Stamping Div.*, 870 F.2d 1112, 1115–1116 (6th Cir. 1989). Contra: *Rock-Tenn Co. v. NLRB*, 101 F.3d 1441, 1446 (D.C. Cir. 1996). The Board accepted on remand, only as the law of the case, the rationale of *Furniture Rentors*. 318 NLRB 602 (1995).

[10] Rohm & Haas never purchased molded sodium from Respondent.

production of molded sodium, thus protecting, and not reducing, the work opportunities of the bargaining-unit employees.

Accordingly, the decision to cease producing molded sodium was not based on Respondent's labor costs. It was instead a purely and fundamentally entrepreneurial decision which, under *First National Maintenance*, was not a "condition of employment" under Section 8(d) of that Act, was not amenable to bargaining, and did not have to be bargained with the Union. I conclude that Respondent did not violate Section 8(a)(5) and (1) of the Act in this respect.

The Union's Demand for the Lantai Agreement

The complaint alleges that Respondent unlawfully refused the Union's demand for a copy of the Lantai agreement. Despite the fact that Respondent had no obligation to bargain with the Union about the Lantai agreement, the Union had a legal right to examine it to ascertain its contents. In that respect, it was relevant, and Respondent does not contend otherwise. Instead, it argues that it complied with the Union's request of September 20 by offering both Koithan and Fleury the opportunity to review a redacted copy of the Lantai contract, which they refused. But that offer occurred the next year, probably four or five months after the Union's demand, in late January 2002, at which time Kober reviewed the contract, paragraph by paragraph, reciting to Koithan and Fleury its terms, omitting price and volume of product. While the Union later offered to sign a confidentiality agreement to obtain the agreement, its representatives insisted that Respondent supply a copy for review by Union counsel and other unspecified outside experts. Kober testified that by that time he did not trust Koithan to give him anything confidential, believing that he had previously divulged other confidential information, which, I find below, he did not.

What is left is Respondent's insistence that it would not turn over a copy of the agreement, but would permit the Union's representatives to read it. A generation ago, the Board concluded that "sound policy dictates that required documentary information should be generally furnished by photocopy," except for "exceptional cases" involving questions of confidentiality, lack of photocopying equipment, or undue inconvenience. *American Telephone & Telegraph Co.*, 250 NLRB 47, 47 (1980), enfd. sub nom. *Communications Workers Local 1051 v. NLRB*, 644 F.2d 923, 925 (1st Cir. 1981). I find that Respondent has shown no cogent reason for its refusal to give the Union a copy of the document. Its excuse regarding its personal conflict with Koithan, discussed below, was unjustified. In any event, Respondent never relied on that reason when it ignored the Union's August and September requests through the end of 2001; and its reliance at trial on that reason was a mere pretext for its unwillingness to share a copy with the Union.[11] I conclude that Respondent violated Section 8(a)(5) and (1) of the Act and shall order Respondent to give the Union a copy of the agreement, subject to the parties' agreement to protect whatever might be confidential in the document. *Minnesota Mining and Manufacturing Co.*, 261 NLRB 27 (1982), enfd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

[11] The Board has held that, absent proof that a union is unreliable in respecting confidentiality agreements, an employer's failure to test its willingness to treat information confidentially "weighs heavily against [the employer's] defense." *Island Creek Coal Co.*, 289 NLRB 851 fn. 1 (1988). But an employer's failure to show that the union is unreliable respecting confidentiality agreements does not per se establish that the refusal to furnish the information is violates the Act. It is only a factor, albeit an important one, in assessing the employer's confidentiality defense. *Reiss Viking*, 312 NLRB 622, 622 fn. 4 (1993). Here, Respondent did not initially refuse to give the Union a copy of the agreement based on Koithan's unreliability.

The Discipline of Russell Koithan

The other allegation of the complaint that relates to the molded sodium operation concerns Koithan's discipline. The information about Respondent's agreement with Lantai was told to him and Fleury and later told to the employees in Kober's memorandum of September 7, 2001, captioned "DUPONT CONFIDENTIAL," which ended: "All persons in discussions with customers and third parties must honor confidentiality requirements with regard to the Lantai technology license, therefore I ask that you not discuss the technology license with anyone outside of DuPont." That letter resulted in the Union asking for the September 20 meeting, referred to above.

On January 4, 2002,[12] the Niagara *Gazette* published an article captioned: "Unions will rally to protest NAFTA," and sub-captioned: "GOING SOUTH: Members say industry is dying in Falls as jobs move to foreign countries." The first paragraph stated that Respondent's employees did not want to be next on the growing list of plant closings and were fighting to protest Respondent's move to shift its sodium production to China, which could result in job loss or plant closure. The article quoted Koithan as saying that: "DuPont has decided to sell $1.5 million worth of American technology to the Chinese to enhance their capability for producing sodium." On January 8, Respondent issued Koithan a "documented discussion" memo—a form of discipline, less than a written warning—expressing that management was "extremely disappointed with your decision to share what we believe to be confidential information with the media."[13]

Koithan denied then, and maintained that denial at the hearing, that he had seen the Kober memorandum, which did not even mention the purchase price, until he was disciplined and that he did not know that the information was "confidential." I do not believe him. He knew about Kober's memorandum, noting in the investigatory affidavit that he gave to the Regional Office that: "After the memo was distributed, the Union requested a meeting with management on the molding issue." The memo was discussed throughout the entire plant; and Koithan admitted that, because he was the Union president, he was routinely in contact with his membership, especially with respect to plant-wide communications from management. Respondent's management is somewhat paranoid about the spread of its information, much of which it considers (justifiably or not) confidential; and he had to be aware of that fact.

Respondent's brief, however, admits that Koithan's conduct "[fell] within the broad penumbra of protected concerted activity," but contends that his activity "warranted lawful discipline because of his knowing and brazen violation of DuPont's well established and well publicized confidentiality concerns." Both parties rely on *Beckley Appalachian Regional Hospital*, 318 NLRB 907, 908–909 (1995), in which the Board held that there may be circumstances where the use of confidential records, in pursuit of an employment dispute, may be protected, relying on *Altoona Hospital*, 270 NLRB 1179, 1180 (1984):

> It is undisputed that employers have a legitimate interest in keeping certain information confidential; that is unquestionably true with regard to a health care employer whose patient records are especially sensitive. An employee's violation of an employer's rule against the disclosure of confidential information may also

[12] All dates hereafter are in 2002, unless otherwise indicated.

[13] Respondent's work rules classified the divulging of confidential information as a "major misconduct offense" which could result in immediate discharge. There is nothing in the record that indicates the genesis or, indeed, the accuracy, of the monetary figure of $1.5 million.

> be the subject of lawful discipline even when the disclosure is made for reasons arguably protected by the Act. The test of such discipline is whether the employee's interests in disclosing the information outweigh the employer's legitimate interests in confidentiality. If they do not, then discipline is lawful. [Citations omitted.]

While Koithan's activities were concededly protected, Respondent's confidentiality interests, particularly in early January, were lame. Its brief recites the legitimacy as emanating from "the limited number of Sodium producers and the price volatility that is the hallmark of competition within this niche market." However, Lantai was a sodium producer before Respondent's agreement and remained a producer afterwards; and there is nothing in what Koithan said or what the rally was about that affected "price volatility." Regarding Respondent's contention that "the Lantai Agreement was particularly sensitive [because] DuPont's partnership with Lantai was the lynchpin of a broader strategy to become the exclusive supplier of Sodium to the world's largest consumer, Rohm & Haas," there is nothing in the article or what Koithan said that suggests any fact that would be helpful at all to anyone in discerning that grand scheme or would be otherwise damaging to Respondent. Respondent did not even disseminate the purchase price, so it could hardly be said that Koithan revealed something told to him in confidence.

As a result, Respondent has proved no legitimate interest in confidentiality; and thus its claimed interest cannot outweigh Koithan's protected activity. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by disciplining him.

Respondent's Closure of Its Terathane Operation

Many of the complaint's allegations deal with Terathane, a liquid chemical used as an intermediate in the manufacture of two of Respondent's well-known products, Lycra and Spandex. On April 29, as part of a corporate-wide reduction of 2,000 jobs, approximately 10 percent of its global work force, Respondent announced to its employees by letter and to the Union at a meeting that its Terathane operation would be closed and its Reactive Metals business restructured. Respondent planned "[b]y the end of June . . . to implement a new structure designed to focus Niagara for success in Sodium and Lithium manufacturing" and planned to lay off 172 employees, of whom 120 were in the bargaining unit, beginning on July 31. Some jobs would be lost as a result of Respondent's closing of its warehouse and powerhouse. Not only would all the Terathane employees be affected: Respondent announced that, with the cessation of the Terathane business, the Reactive Metals business would have to support all the costs of the facility; and there would be a reduction of jobs there, too, in part caused by the reduction of its production of molded sodium.

From the beginning, Respondent committed to make available its Career Transition Plan (CTP), whereby employees could voluntarily leave their employment with severance of a minimum of two months' pay, plus another month of pay for every two years of service up to a maximum of one year's pay, $5,000 tuition reimbursement, and continuation of medical benefits. With Respondent's announced implementation date of the end of June, two months from then, employees had to start thinking about their future plans rather quickly. So, too, did Respondent. With its unilaterally established July 31 date for the termination of many of its employees, and not being sure whether some employees scheduled to lose their jobs would have to remain to train other employees, Respondent had to think about sending out notices under the Worker Adjustment and Retraining Notification Act (WARN) by May 31, 60 days prior to that proposed termination date. Respondent undoubtedly makes too much of this point. It could have given notice to all of its employees, even including some that might not have been laid off, and still

could have complied with its legal responsibilities. More important, however, was the requirement of the CTP of 60 days' notice of layoff. Thereafter, employees would have 60 days to continue to be employed, while working with job counselors to help them with writing of resumes and otherwise preparing and helping them to look for new employment.

Thus began a series of bargaining sessions on the effects of the Terathane closure, interrupted and delayed somewhat by the Union's insistence from time to time that, before it would bargain about the effects of the closure, Respondent had to bargain about the decision itself, a position that the Union maintained through May. (The complaint does not allege that Respondent's refusal to bargain about its decision violated the Act.) The bargaining was further impeded by the Union's intermittent insistence throughout May that the Terathane closure and sodium restructuring had to be bargained separately. At least one issue narrowed to the question of which persons would remain employed by Respondent. The parties understood that some employees would accept the benefits of the CTP, and by May 9 the parties had agreed that the employees would exercise their choice of that option between then and May 30, the date when the soon-to-be-vacant jobs would be bid. The more critical problem for the purposes of this proceeding was the determination of the method by which employees would be entitled to what remaining jobs. In fact, the older employees with more seniority were employed in Terathane. Their positions were going to be terminated; and they had bumping rights with their greater seniority, which in Niagara was very important.

The Section 8(d) Allegations

The jobs that had to be filled were in the Reactive Metals area. All parties agree that there was a practice or there were rules that dealt with bidding procedures for various jobs in the facility, generally called Internal Job Placement (IJP). The Union wanted to adhere to these rules strictly; Respondent wanted to change them. Interestingly enough, it was Respondent which initially proposed these rules in 1972, over 30 years ago; it was the Union which rejected them; it was Respondent which unilaterally imposed the rules on February 1, 1973, after declaring impasse; and it was Respondent which is charged in this proceeding with having changed those rules unilaterally, after following the same rules for 30 years, except for perhaps a modification in 1994, but the record does not reflect what that modification, if any, may have been.

The following constitute the rules that applied to the sodium operation: Certain jobs are "canvass positions." They require that employees who fill them have a certain degree of knowledge or training. When there are vacancies in canvass positions, there are job categories that automatically are preferred over all others, so that supervisors would first canvass the employees having those jobs, by seniority, to ask them if they want the open job. If the canvass was unsuccessful, or the job to be filled was not a canvass position, the job would then be filled from a different group of employees. Of those employees who are involved in any way with producing sodium, series of jobs are grouped by "process, craft or working group." When a job vacancy occurs in that group, the employees in that group have the first chance to fill that vacancy. They do so by filling out, either then, or the form has been prepared earlier and kept on file, a sodium IJP form, which shows their interest in other sodium jobs or in remaining in their present positions. Management would then review the sodium IJP forms on file and award the job to the most senior interested worker. If the job still remains unfilled after the canvass and the sodium IJP step, the vacancy is filled through plant-wide bids, which are posted for a minimum of five calendar days, excluding Saturdays and Sundays. At the close of the bidding, management would sort the plant-wide bids by seniority and award the jobs to the senior qualified bidder. As that bid would be awarded, a new vacancy might be created which, in turn, would have to be filled.

What is complained about in this proceeding starts with Respondent's request on April 29 that, notwithstanding the usual practice that employees would have the right to change their designation of the jobs that they wanted up until the job was actually filled, employees would no longer be permitted to change their minds. This required all the non-sodium employees to fill out a new bidding form for the purpose of the plantwide bid, the Sodium Job Placement Form (SJPF), on which the employees designated their preferences of multiple jobs on one form. In addition, in order to ensure that all the jobs would be filled on time, at least to complete the task in accordance with Respondent's unilaterally set schedule, Respondent wanted to conduct the canvass, review the sodium IJP forms, and complete the plant-wide bidding all on one day, rather than on separate days, as in the past.

As to these changes, the complaint alleges a violation of Section 8(d) and 8(a)(5), as opposed to other complained-of changes, which are alleged as unilateral because, although the parties bargained about the changes, they were not at impasse. The distinction between the two types of violations was reaffirmed in *St. Vincent Hospital*, 320 NLRB 42 (1995), quoting from *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984), affd. sub nom. *Auto Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985) (fn. citations omitted), as follows:

> Sections 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Generally, an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good-faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "modif[y] . . . the terms and conditions contained in" the contract: the employer must obtain the union's consent before implementing the change. If the employment conditions the employer seeks to change are not "contained in" the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.

The parties' 1983 evergreen agreement, a signed agreement reprinted on October 30, 1997 "solely to incorporate" five enumerated supplemental agreements, contains a "zipper" clause (Article 3, Section 5), which reads as follows:

> This Agreement constitutes the entire agreement between the parties hereto as of the execution date hereof. However, any amendment which may hereafter be mutually agreed upon between the parties, when executed in the same manner as this Agreement, shall become and be part of this Agreement.

Regarding the first sentence, the "entire agreement" clause, the Board has held that a zipper clause that does not specifically abolish past practices and understandings nonetheless contains those prior practices. Indeed, the Board, in considering the same zipper clause in *E. I. DuPont de Nemours & Co., Inc.*, 294 NLRB 563 (1989), remanded sub nom. *Martinsville Nylon Employees Council Corp. v. NLRB*, 969 F.2d 1263 (D.C. Cir. 1992), adopted the construction of "entire agreement" clauses in two arbitration decisions. In one, *American Seating Co.*, 16 BNA LA 115, 117 (1951), Arbitrator Whiting wrote:

> I cannot accept the Union's theory that since the foundry scrap plan is not mentioned in the contract of July 1, 1950 it is automatically eliminated by Section 59 of that contract. Collective labor agreements are not negotiated in a vacuum but in a setting of past practices and prior agreements. Such an agreement has the effect of eliminating prior practices which are in conflict with the terms of the

> agreement but, unless the agreement specifically provides otherwise, practices consistent with the agreement remain in effect. The written words of the contract may express the entire agreement as is provided here, but practices are not necessarily matters of agreement. Practices arise from custom, usage or continued toleration by one party of action by another which is not in violation of the contract.

In the other, *Wallace Murray Corp.*, 72 BNA LA 470, 474 (1979), Arbitrator Abrams also found that the "entire agreement" clause, which provided that the agreement "superced[ed] all prior agreements, understandings and practices, whether oral or written," was effective only as to those agreements, understandings, and practices which conflicted with the terms of the agreement. Admittedly, he relied on evidence that the union there refused to sign an employer-submitted letter agreement which acknowledged that all past practices, extra-contract agreements, and understandings, whether written or oral, would have no force or effect. And he indicated that, if the parties had agreed to abolish prior practices and understandings, arbitrators would follow the dictates of the contract. But, without such a clause, the proven past practices and agreements remained in effect.[14]

Applying these principles, the Board in *DuPont* held that it would not find a violation of Section 8(d) when the practice that was relied on was inconsistent with the language of the collective-bargaining agreement.[15] In doing so, it wrote:

> [W]e do not suggest that an agreement can never be read as encompassing past practices that are not specifically written into it. But where, as here, the contract contains a clause stating that the written agreement is to be the parties' "entire Agreement" except as to any later supplemental agreements "executed in the same manner" as the main agreement, and the past practices in question are inconsistent with the written terms, those practices cannot properly be considered implied terms of the agreement. [294 NLRB at 563.]

Here, the past practice, as to which there is no dispute, does not conflict with the terms of the written collective-bargaining agreement, which provides that seniority shall be used in filling jobs when there is a reduction in force and in the filling of vacancies. The agreement also provides that vacancies within the bargaining unit, except for jobs which are filled from within the process, craft, or working group, will be posted for five days and further provides the manner of such posting. The past practice, unilaterally adopted after Respondent bargained with the Union and could not reach an agreement, merely implemented the contract's guarantee that seniority would be the controlling factor and the manner of filling vacancies. Thus, the practice merely implements the agreement, *St. Vincent Hospital*, 320 NLRB at 44; and is an implicit term of the agreement. *Bonnell/Tredegar Industries*, 313 NLRB 789, 791 (1994), enfd. 46 F.3d 339 (4th Cir. 1995). In addition, the 30-year old rules and practices and policies that the General Counsel contends were breached arose long before 2002, the date that the agreement was last

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[14] In addition, in its 1989 *DuPont* decision, at 563 fn. 2, the Board cited with approval Elkouri & Elkouri, *How Arbitration Works*, 437–451 (4th ed. 1985). The 5th edition (1997), at 630–645, is to the same effect.

[15] Respondent's reliance on *George E. Failing Co.*, 93 LA 598, 602 (Fox, 1989), is misplaced. The past practice that the employer relied on was in direct conflict with written terms of the collective-bargaining agreement. Although the arbitrator also relied on the entire agreement clause, that was stronger than the clause at issue in this proceeding, providing that "this Agreement will replace and supersede any and all previous agreements and . . . it shall be firm on all points covered herein."

extended; 1997, the date that the agreement was last revised; and 1983, the date that the last written agreement was executed. Thus, the second sentence of the zipper clause, which applies only to amendments "hereafter . . . mutually agreed upon" does not apply to the rules and practices that were in effect prior to the original 1983 date of the evergreen contract.[16]

In addition, the parties understood that many of their contractual terms could, notwithstanding the broadest interpretation of the zipper clause, be orally modified, without a signed, written agreement. For example, wages are not set forth in the evergreen contract. Instead, they are negotiated yearly and are, at least for the year beginning May 6, contained in a 12-page, unsigned booklet. Respondent makes no contention that it is not bound by those rates for the term of the one-year agreement. Rather, Respondent's brief contends that "the wage book *is* the product of bi-lateral negotiations." (Emphasis in original.) But the rules and practices regarding bidding on jobs were also the product of negotiations between Respondent and the Union. Similarly, Respondent's Plant Procedures Manual, albeit an internal management tool for applying certain terms of the agreement, contains not only those rules concerning the application of seniority, which had their genesis in bilateral negotiations, but also rules applying to the taking of vacations, which have been consistently applied by Respondent and about which it has even received and processed grievances.[17]

In sum, the rules regarding the application of seniority were the product of collective bargaining, and the parties considered themselves bound by that product in the same way as if the product had physically been contained in the collective-bargaining agreement. Thus, in the opening bargaining session concerning the closing of Terathane, Wallden announced that Respondent intended to follow its time-honored past practice, with two exceptions: one was that it wanted all the openings to be filled on one day, rather than conducting the canvass, sodium IJP bid, and plant-wide bid over a period of a number of days, as had been the custom in the past; and the other, that Respondent "would like to bargain to suspend *the individual's right to change their mind* about accepting a bid position once they make the selection rather than allowing them to change their mind up to the date the move takes place." (Emphasis supplied.) Wallden clearly understood that what he was asking to change was a "right," as to which Respondent was bound, just as if it were part of and contained in the contract.[18] I conclude that it was.

And, in doing so, I do not find that "right" de minimus, as Respondent now contends in its brief. Under the collective-bargaining agreement, Respondent agreed that employees shall have seniority rights in the selection of the jobs that they are to work. One of the rights given to them was the ability to pick their jobs, in accordance with their seniority, and to make that choice

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[16] For this reason, as well as the peculiar nature of the parties' dealings for the past 30 years, the court's decision in *Martinsville Nylon Employees* is distinguishable, as is *Pleasantville Nursing Home, Inc. v. NLRB*, 351 F.3d 747 (6th Cir. 2003). See also, the contrary rationale of *Certified Corp. v. Teamsters Local 996*, 597 F.2d 1269, 1271 (9th Cir. 1979).

[17] The Manual contains provisions dealing with trade secrets, confidential technical information, training, and development. Respondent did not distribute the Manual to the Union, and the Union did not sign the Manual or any part of it. Pursuant to a demand for information, the Union obtained a copy of the Manual for the first time in 2003. Although that copy did not contain a forward, the weight of the evidence convinces me that all other copies (the copies were limited in number to 14) contained a forward which stated: "Some material relates to the existing Management-Union Agreement; however, it is not to be construed in any manner as being a supplement to the Agreement or as having any contractual or legal status."

[18] The Plant Procedures Manual provided: "An employee may decline a job he had successfully bid up to the date of transfer."

when they knew exactly what jobs were then available. Thus, even had they pre-selected their choice, they were given one last chance to decide what they were going to be doing, a choice made more important because some jobs in the sodium operation were difficult, dirty, extraordinarily hot, and somewhat dangerous. At the time when Respondent assigned the jobs on May 30–31, it canvassed for two jobs, as it had always done, and then assigned jobs according to the sodium IJP bid forms, as it had always done, and then assigned jobs according to the new plant-wide bid forms—the latter two steps without affording the employees the right to pick their job from the openings that remained, the only meaningful change from prior practice which I find occurred.

Respondent contends, however, that, for a violation to be found, under *C&S Industries, Inc.*, 158 NLRB 454, 458 (1966), there must be "a continuing impact on a basic contractual term or condition" of employment. Accord: *St. Vincent Hospital*, 320 NLRB at 44. Here, it argues, the abandonment of the employees' right to select their jobs was used only on this one occasion, never to be used again. Furthermore, Respondent contends that the General Counsel has failed to identify even one employee who ended up in the wrong sodium job. Respondent incorrectly puts emphasis on matters that are ancillary to the actual nature of its unlawful activity. "Sec. 8(a)(5) and (d) of the Act prohibit an employer who is a party to an existing collectively bargained agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union." *Southern Container, Inc.*, 330 NLRB 400, 400 fn. 3 (1999). "The duty to bargain in good faith . . . requires that the parties honor the agreement without demanding bargaining over changes until the period specified in Section 8(d)." *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991).

Once Respondent changed what the parties had originally agreed to, there was a violation. Whether that ultimately resulted in employees' loss of desired jobs cannot be known, because Respondent never gave the employees the opportunity to select their jobs as Respondent had agreed. The point is that the loss of the right to choose may have had a continuing impact on basic terms or conditions of employment of the employees, because if an employee wished to change his or her mind about taking a job, had Respondent not changed its agreement, then at least one other employee, and possibly many other employees, would have been faced with different jobs that were open for their consideration. Respondent did not give them that right.

The Union was correct in insisting that that right be maintained, and Respondent violated Section 8(a)(5) and (d) by changing its contract mid-stream.[19] There was nothing "unique" in Respondent's decision to close its Terathane operation that permitted it to rid itself of the seniority benefits provided by the contract. There were jobs to be selected pursuant to the seniority system. There had always been jobs to be selected using seniority. As Koithan testified, the honoring of the right to choose one's job at the time of the choosing would not have resulted in any significant delay. In fact, had Respondent begun the bidding process only a week earlier, the selection of jobs could have been accomplished by May 31, as it eventually was by Respondent, but in violation of the contract and in violation of the Act.

[19] As explained above, by such insistence, the Union did not create an impasse. It merely refused to consent to Respondent's unlawful attempt to implement a change in an existing, effective collective-bargaining agreement. Furthermore, the Union's refusal to bargain did not constitute a waiver of its right to bargain, as Respondent contends. The Union had a right to demand that Respondent comply with the terms of the agreement it made.

To the contrary, I find no violation in Respondent's failure to follow its past practice of filling jobs over a number of days. That that was what happened in the past was the necessary consequence of employees having the right to choose their positions and opt out of their choice at the very last moment. Because typically in the past the vacancies that had to be filled numbered one or two at a time, Respondent never encountered the type of mass movement of employees as it did with the Terathane closure. But, if it maintained a procedure whereby it filled all these jobs over a shorter period of time, while at the same time giving its employees their rights to choose their jobs and to change their minds, no harm would be done. To the same effect, the change of the form for the designation of the employees' choice of jobs meant nothing. What was important was that the seniority rights of the employees should not be disturbed. Respondent continued to use the old sodium IJP form that had been used in the past to fill jobs in sodium from those employed in sodium and used a new form (SJPF) for the bid for sodium jobs by those who had been employed outside the department. That use did not affect employment rights. Rather, the actual making of the choice by the employees was accomplished, as it had been in the past, in accordance with their seniority.

Because Respondent historically canvassed only for two sodium jobs, Lithium Operator and Group I Designate, Respondent's addition of Group II Designate and Sodium Recovery Relief Operator to the SJPF as "canvass jobs" on the plant-wide bid form might have been a meaningful change, but canvassed jobs were not "contained" in the contract for the purpose of Section 8(d). Besides, the new form was used only for the third-step plant-wide bid; it did not relate to the first-step canvass or the second-step use of the IJP for sodium employees. And, in this instance, no canvass for these two jobs had to be conducted, because there were no Sodium Recovery Relief Operator openings available for the plant-wide bid, and the most senior employee bid on and was awarded the Group II Designate job.

The General Counsel's brief also complains that Respondent violated Section 8(d) by refusing to honor the seniority of several employees in the mechanical and clerical IJPs, alleging that Respondent had procedures in place to cover eliminations of jobs and, more specifically, who was to be laid off, depending upon whether they had the seniority and the qualifications to displace someone else. In the mechanical jobs, in particular, management had the right not to follow seniority if, for example, trainees had more seniority than fully qualified "top craft" persons. Although the procedures were set forth in documents which were not contained in the collective-bargaining agreement, Article VIII, Section 3 of that agreement provided, in relevant part, as follows: "In a case where seniority is not the determining factor, Management will review circumstances of the case with the UNION before action is taken."

On the other hand, it is clear that Respondent had the right to set appropriate staffing levels in its sodium business following the April 29 restructuring announcement. James Briggs, a staff representative of Paper, Allied-Industrial, Chemical and Energy Workers (PACE), conceded Respondent's right to determine staffing levels, noting that the Union had never tried to bargain them. That is what happened in these instances. As a result of the reorganization, Respondent determined that it would retain 10 fully qualified "top craft" persons in the maintenance department. Trainees were, by definition, not "top craft." Even though two of them, John and Vincent, had more seniority than two others, they were not retained not because their seniority was bypassed but because there were openings only for "top craft" employees. They could not perform the tasks that Respondent wanted them to. They were not qualified; they needed a year's more training. Respondent did not violate Section 8(a)(5) and 8(d)

I also dismiss the allegation involving two clerical employees, Rebecca Scherrer and Sherilynn Zeitz. Respondent had in May proposed a substantial reduction of its clerical employees. Scherrer had been medically disqualified from working in the sodium operation and

given a job as a clerical. My understanding of the General Counsel's original claim was that she should have been permitted to bid on a sodium job and then be turned down, as a prerequisite for obtaining a disability pension. The General Counsel's reply brief no longer relies on that theory; instead, it relies on the testimony of Union Secretary-Treasurer Lynn Siegfried that Scherrer was told by someone representing Respondent that, if she did not take CTP, she would not get anything. So, she did not bid on a job and went on voluntary layoff. The General Counsel argues that the statement made to her was false, because she would have been able to bid successfully for a clerical job.

I have little reason to credit Siegfried's hearsay testimony and do not. Besides, Scherrer could have still bid for a clerical job, preserving her right to take her CTP conditionally, if she failed to bid successfully for a clerical job. Moreover, the problem with the General Counsel's current contention is that there was no clerical job opening for Scherrer. She might have been entitled only to a temporary job (Siegfried's); and Respondent had declared that it would not bump employees who were not fully qualified into temporary jobs, which were being held over only to permit the parties time for more bargaining. Scherrer would have needed four or five weeks' training.

The claim on behalf of Zeitz is based on a somewhat similar premise, convoluted in that she did not know how many clerical jobs were going to remain and could have bid on a sodium job or chosen to remain a clerical employee, and might have been retained, if she had known that another clerical employee was going to bid on a sodium job. Respondent did not even brief this claim and did not brief the Scherrer issue beyond the claim that she was denied her right to obtain a disability pension; and I find that it had good reason not to. The unilateral Section 8(d) changes that were alleged in the complaint all relate to the bidding procedure of May 30–31. The events dealing with Scherrer and Zeitz occurred no earlier than October. I conclude that they were not included in the complaint and were not fully litigated. I dismiss them, noting that in any event it appears that the employees may have made some unfortunate choices, for which they may not have been wholly responsible. But that does not make Respondent responsible under the Act.

The General Counsel also contends that Respondent violated Section 8(d) by permitting a supervisor to obtain a unit job, in violation of a "modification" to Article VIII, Section 8 of the collective-bargaining agreement, which governs the crediting of seniority to employees transferring into the bargaining unit, by permitting rollbacks only when a bona fide opening existed in the unit. All parties agree that the agreement does not specify the circumstances under which non-unit employees may or may not "roll back" to the unit. The General Counsel relies only on two instances to prove a past practice: one, at the May 2 meeting, the Union named at least three non-unit employees who had been told upon accepting the CTP or being laid off involuntarily, that they would not be permitted to roll back; the other, when Respondent sold Niachlor, it told its supervisors that there was no opportunity to bump back to the wage roll.

Those two incidents hardly meet the definition of a clear and longstanding past practice that had acquired the status of an established condition of employment. *Blue Circle Cement Co.*, 319 NLRB 661 (1995); *Lamonts Apparel*, 317 NLRB 286, 287 (1995). As noted in Elkouri & Elkouri, *How Arbitration Works*, at page 632:

> [E]ven assuming that a matter is such that it may otherwise be given "binding practice" effect as an implied term of the agreement, it will not be given that effect unless it is well established—strong proof of its existence will ordinarily be required. Indeed, many arbitrators have recognized that, as stated by Arbitrator Jules J. Justin: "In the absence of a written agreement, 'past practice,' to be

> binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." [Footnotes omitted.]

Koithan agreed that, in part, the parties merely disagreed about what the collective-bargaining agreement meant. The two incidents relied upon do not resolve what the parties meant. The agreement is silent. I conclude that Respondent's prior treatment of two rollbacks do not cause any particular practice to be contained in the agreement. For this reason, there can be no violation of Section 8(d).

The final alleged Section 8(d) change concerns training periods. In the wage rate booklet, there is a wage rate structure (or rate progression system), whereby employees are assigned a pay grade, from pay grade 1 to 7, with the addition of grade 7T, and paid in accordance with the "level" that an employee attains, from level 1 to 4, with the addition of "top," each higher level paying more than the lower level. There is only level 1 in pay grades 1 and 2 before reaching "top"; in pay grade 3, there are levels 1 and 2; in pay grades 4 to 6, there are levels 1 to 3; and in levels 7 and 7T, there are 4 levels. In addition to the pay grades, there is also written for almost all positions "Min. Qual. Time," which is defined in a footnote as representing the "minimum number of weeks in a job level that are required before progressing to the next higher level." However, next to the number on many of the positions is a footnote stating: "These represent normal testing times for qualification. These times can be shorter if all qualification conditions are met." Another note, for the utility pool operator, states: "Training pay rate and progression are the same as cell operator. A minimum of Pay Grade 5 top rate will be paid upon completion of CO training and when not covering a specific position." The number of weeks coincides with the number of weeks required for training, as prescribed in the Plant Procedures Manual.

The complaint alleges that Respondent unlawfully shortened the training periods in the sodium operation in June in violation of Section 8(d), after proposing various changes, such as reducing the training period for a cell change operator/cell operator relief from 25 weeks to 13 weeks. What is strange about this allegation is not that the employees were hurt by the change. Thus, there is no claim that, once the employees passed their training, despite the fact that they did so early, they were or were not paid as if they had completed their training. In fact, by completing their training, they were eligible to work overtime, which would seemingly result in their eligibility to earn more money, or, alternatively, they were entitled to more money, having completed their training period.

The record demonstrates that Respondent never followed what was provided for in the Plant Procedures Manual and Respondent's own training and qualification procedures, which were negotiated with the Union. Rather, the length of training depended on how quickly an individual learned the tasks of the new job. Thus, while the procedures required employees to be trained for 6–12 weeks for the cell operator job, employees actually received an average of less than 6 weeks' training; and employees who transferred to sodium during the restructuring received 5–11 weeks' training. In addition, in adopting new training schedules, Respondent merely reflected its experience over the years, plus the important fact that many of the employees who were transferring from Terathane had previously held positions in the sodium department and thus required far less training. Even Koithan admitted that he would have needed only 3–4 weeks to retrain as a cell operator, having done that job for six months in 1988.

Based on the actual experience, I find that there had been no agreement about the amount of training to be given to the employees. Although it is true that certain pay levels

appear to be linked to a training period, there is no guarantee that any training period will actually be adhered to. Rather, Respondent considered each new employee as an individual case, increasing his or her responsibility depending on the individual's rate of progress in learning the job. There is thus no specific agreement contained in the parties' collective-bargaining agreement under Section 8(d) that was varied mid-term, and I dismiss this allegation.

The Other Section 8(a)(5) Allegations

As stated above, the complaint alleges a number of other changes that were made by Respondent in violation of Section 8(a)(5) and (1). A consideration of the entire record reveals that these were the subject of intense bargaining by both parties, bargaining which continued at least to the closing of the hearing, and no doubt later. The complaint does not allege that Respondent's decision to terminate its Terathane operation was unlawful. As the earlier discussion shows, the law is clear that Respondent had the right to make that decision unilaterally. If it had that right, presumably it also had the right to determine when the operation would close, and thus when employees would have to make difficult decisions about their future, such as whether to take a voluntary retirement or what kind of jobs that they would like to work in place of the jobs that they lost. It may be that the setting of a date created problems and that there might have been some unfairness in the fact that there was a time limit placed on those decisions, but those problems were the necessary consequence of such a major shift in Respondent's business.

In other words, much of what the Union in particular argues is not lacking in good sense. The employees had to make difficult choices, and Respondent's proposal placed them in a dilemma, which perhaps might have been avoided, had Respondent chosen to make different proposals. But what the Act demands is not necessarily a fair result of negotiations, but that the parties negotiate in good faith in an attempt to resolve their differences, to consult with one another freely to persuade the other side that their proposals are flawed or create unfairness or are impossible to comply with.

The record reveals that the parties had that opportunity to bargain. Between April 29 and May 30, when Respondent filled the jobs in sodium, the parties had met 16 times, and 21 more times between May 31 and July 31, when employees were first laid off. Not only did these numerous meetings take place: Respondent made itself available every day, Monday through Friday, from 8:30 a.m. until Noon, and at other times if the Union desired, and agreed in part to the Union's proposal to switch all the Union's bargaining committee members to the day shift so that they would all be available for negotiations, for which they then would be paid.

Thus, Respondent went overboard to ensure that the Union had the opportunity to reach an agreement. The Union squandered some of this opportunity by insisting that Respondent bargain about its decision to close the Terathane operation, as opposed to the effects of the closure, and then refusing to bargain about the reorganization of sodium until its bargaining about the effects of the closure of Terathane had been completed, delaying the consideration of many of the changes about which it now complains. As found above, the Union had no right to bargain about the decision to close the Terathane operation; and it had equally no lawful right to refuse to talk about the other matters at its own pleasure. By the time that the May 30 deadline was reached, the parties were at impasse on how to deal immediately with the problems that Respondent faced in continuing to run its business without the Terathane operation. If it had the right to close that operation, as all parties now concede, it implicitly had the right to set a date for that closure. It had the duty to bargain about the effects of that closure, and the time that it allotted for that discussion was ample. It was thus privileged to begin to implement what it had

proposed and what the Union could not agree to. I conclude that, without more, Respondent did not violate Section 8(a)(5) and (1) of the Act.

However, the General Counsel contends that there were numerous other actions taken by Respondent that affect this conclusion. First, he alleges that Respondent declared an impasse in the context of serious unremedied unfair labor practices that affected negotiations, to wit, its discipline of Union President Koithan, its unilateral subcontracting to Lantai, and its refusal to furnish the Union with a copy of the Lantai contract. Board law is clear that "a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001), quoting *White Oak Coal Co.*, 295 NLRB 567, 568 (1989). Because I have found, above, that Respondent's alleged unilateral subcontracting did not violate the Act, I reject the General Counsel's argument in that respect.

Regarding the two unfair labor practices that I found, there is no presumption that an employer's unfair labor practices automatically preclude the possibility of meaningful negotiations and prevent the parties from reaching good-faith impasse. *Intermountain Rural Electric Assn. v. NLRB*, 984 F.2d 1562, 1569–1570 (10th Cir. 1993); *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981), enfd. mem. sub nom. *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982). The Board affirmed in *Titan Tire Corp.*, 333 NLRB at 1158, that not all unremedied unfair labor practices committed during negotiations will give rise to the conclusion that impasse was declared improperly, thus precluding unilateral changes, citing *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999). Only "serious unremedied unfair labor practices that effect [sic] the negotiations" will taint the asserted impasse, *Titan Tire Corp.*, 333 NLRB at 1158, quoting *Noel Corp.*, 315 NLRB 905, 911 (1994).

I conclude that Respondent's unfair labor practices did not affect the impasse, because they were not subjects raised at and had nothing to do with the negotiations. They did not directly or indirectly impede negotiations. They did not increase friction at the bargaining table. If anything did, it was the Union's insistence that bargaining had to be done its way, first, regarding the decision to close the Terathane operation, and, second, about the effects of that closure (only beginning as late as June 12), before talking about other matters, such as the sodium restructuring, which the Union wanted to bargain separately; and then seemingly being less than prepared for negotiations, causing Respondent greater frustration. Thus, the unfair labor practices "did not contribute to the deadlock in negotiations so as to prevent a lawful impasse," *Litton Systems*, 300 NLRB 324, 333 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992); and the impasse could not have resulted in bad-faith bargaining as a result of Respondent's two unlawful acts. Compare *Pertec Computer Corp.*, 284 NLRB 810 (1987).

The complaint alleges that Respondent violated Section 8(a)(5) by implementing four terms that were inconsistent with its last offer. *Int'l Assoc. of Fire Fighters*, 304 NLRB 401, 402 (1991), citing *Storer Communications*, 294 NLRB 1056, 1093 (1989). The first concerned a proposal, which Respondent made on May 15, that all employees on site complete the plant-wide bid form. The General Counsel contends that not all employees filled out the form. I have found only two of more than two hundred who did not: Koithan, as a matter of principle; and powerhouse employee John Venne. The record reveals that, as of the hearing, Venne remained in the same position that he had occupied earlier; so his failure to complete the form had no consequence. Furthermore, the mere fact that two employees failed to fill out the proper forms did not constitute any change of Respondent's position that all employees were to complete the

bid forms. The two employees' possible insubordination should not benefit them with relief in this proceeding.[20]

The second alleged inconsistency referred to Respondent's proposal that all employees who were laid off would be placed in jobs based on their seniority and their ranked preference on the sodium job placement form. However, instead of placing Kelly Bright, Patricia Juzwicki, and Venne in jobs based on their seniority, Respondent designated them as "bid later," so that, at least regarding Juzwicki, she was placed in a different job from the one that she would have been given on May 31. Respondent explained that its deviation from what it originally proposed resulted from a decision that these employees were to be held over in their current positions for a considerable and indeterminate time. As found above, Venne was still in his position at the time of the hearing. Bright, a clerical employee, was originally scheduled to be placed in the position of cell operator; but negotiations with the Union about the number of clerical employees to be retained—Respondent originally wanted four, the Union more, and Bright was the fifth in seniority—were still continuing, and Respondent determined to retain her. In fact, as a result of the negotiations, Respondent added a fifth clerical position, as the Union had urged; and Bright retained her position. The evidence regarding Juzwicki, a warehouse employee, is less clear. She had bid on two jobs for which she lacked sufficient seniority. Kober testified that she "wasn't being released right at that time," so she was designated as a "bid later"; but the result of that was that later she became a cell change operator and then utilized her seniority to become a sodium recovery operator. However, Kober testified, without contradiction, that designating her as a "bid later" had no impact on her ultimate assignments of positions; and neither reply briefs of the General Counsel or the Union contend otherwise.

I find that the Union was not misled by these minor changes, that the Union could have had knowledge of them had it participated in the bidding and selection process, which it refused to do, and that no one was hurt or even affected by them. These minor changes fall well short of the standard that a unilateral change must be "material, substantial, and . . . significant." *Peerless Food Products, Inc.*, 236 NLRB 161 (1978).

The third alleged inconsistency resulted from Respondent's alleged acceptance on May 30 of the Union's proposal to post a truck driver position. Respondent did not in fact post that position. The nature of the dispute is well summarized in Respondent's notes of the negotiations held on September 10:

> The Union said it had discussed, and agreed to previously, the displacement of contractors. Four jobs were identified: 2 Electricians; 1 Field Machinist, and 1 Truck Driver. The Union asked if Management agreed that agreement had been reached with regard to the truck driver being displaced. Management responded that it has not been determined what the situation will be regarding the warehouse and the need for a permanent truck driver position. Management is still evaluating the whole warehouse situation. The Union stated that a contract truck driver is still on site and it was their understanding that this position was going to be posted on July 17, 2002. Management stated that it is still evaluating the need for this position. The Union said that Management proposed that the job would be posted on July 17 and the Union accepted that. Management recalled that at that time there was no agreement regarding qualifications. The Union said

[20] The General Counsel's brief alleges that some employees received instructions from Richie Smith, a first line supervisor, that they could, but were not required to, fill out the form. This was not alleged at the hearing as one of the alleged inconsistencies.

> that we had a clear agreement. The Company made the proposal that the job would be posted on July 17 and it was never mentioned again during any subsequent meetings that this job was not going to be posted. We did not reach agreement on the fact that we would send someone to school as was requested by the Union. The Union stated that it accepted that the job would be posted on July 17, 2002 and it was so clear to someone that this would happen that they went out and got themselves certified on their own in anticipation for this job posting.

According to these minutes, the parties disagreed about whether they had made any agreement. Only Respondent's witnesses, Wallden and Vespucci, testified about this in detail at the hearing. Prior to the decision to cease its Terathane operation, Respondent employed a contractor driver to move materials between its offsite warehouse, Building 425, and the plant. As part of its restructuring, Respondent decided to vacate Building 425, leasing instead a warehouse on Lockport Road in Niagara. It originally did not include in its staffing plan a truck driver to carry materials between an offsite warehouse and the plant, but the Union requested on May 24 that Respondent replace the contractor-driver and a couple of other contractors with Respondent's employees, putting the job up for bid, and training the successful bidder. Respondent countered with a proposal basically agreeing with the Union, agreeing to post the driver position for bidding on July 17, but declining to train the driver. There is no evidence that the Union ever agreed to this counteroffer.

Prior to that July date, the Town of Niagara requested Respondent to vacate the Lockport Road warehouse, and Respondent complied; as a result of which, because all the material was stored on site in trailers, Respondent had no need for a truck driver to transport material from its plant to an offsite warehouse and so advised the Union that: "We were in limbo as far as what our overall alternate warehouse plans were." As of the time of the hearing, Respondent did not utilize a full-time truck driver, either employee or contractor, that hauled goods to and from the warehouse on the site. Instead, it hired a part-time contractor when a move was needed, as few as two and as many as four times a week.

The Union must have known about this change of circumstances, because it was involved in the effort of Respondent's hiring of extra employees, and assignment of overtime, to move its product out of Building 425 into the Lockport Road facility and unload the trucks that were transporting it there. The Union was also aware from Wallden's advice on June 19 that Respondent had to vacate the Lockport Road facility warehouse immediately and that it would not be able to store material because of the Town's concern with the hazardous material. As the bargaining minutes reflect:

> The next topic of discussion was the present warehouse situation. Management's intent was to use a facility on Lockport Road in the Town of Niagara. Due to a town ordinance that does not allow the transfer of chemicals through the town, we will not be using that storage facility. The plan is to still vacate the present warehouse at the end of June. We will use containers for storage, and there will be a lot of movement with regard to these storage containers. Management stated that there would be opportunities for overtime for the movement of these containers.

Thus, the Union knew that Respondent would no longer need a full-time driver and that, by consequence, whatever agreement that there had been for the bidding of that position—and there appears to be none because the Union had never agreed with Respondent's position that

it would not train the successful bidder—that agreement had been cancelled. I conclude that Respondent did not violate Section 8(a)(5) and (1) in this respect.

The fourth and final change or inconsistency concerns Respondent's initial proposal that an employee who was awarded a job as a result of the May 30 plant-wide bid would be "locked in" to that job. One employee, Donald Martin, was returned from a lithium operator job to his former position as an instrument mechanic. The General Counsel misunderstands Respondent's proposal, which was intended to prevent employees from changing their minds after bidding on jobs. As Kober testified:

> On the plant wide bid form he expressed an interest to move to sodium operations. After the bids were opened and he was placed in that job medical determined that he was not going to be approved to move to operations and so then he had to go back to the maintenance organization.

The Union was informed and agreed with this determination. As the minutes of July 10 negotiations state:

> At that time, Mike Boorum, Sodium Area Manager, stated that they would be declaring an excess in the Instrument Mechanic group since one of the Instrument Mechanics (Don Martin) was disqualified in Lithium and had seniority to return to the IM Group. The additional Instrument Mechanic would be able to bump the E&I Planner which in-turn would go to the Electrical Group and Junior Electrician will go to Production. The Union agreed that this was how the movement procedure worked, and stated they had communicated to the Instrument Mechanical group that this may happen.

I conclude that Respondent did not violate Section 8(a)(5) and (1) of the Act in this respect.

Respondent's Failure to Provide Information

The final allegations concern Respondent's failure to supply information demanded by the Union or failure to supply such information in a timely fashion. The Board wrote in *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994):

> [I]t is well settled that an employer, on request, must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty to provide information includes information relevant to contract administration and negotiations. *Barnard Engineering Co.*, 282 NLRB 617, 619 (1987); and *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983).

The Names and Addresses of Retirees

Between October 10 and December 6, 2001, Koithan and Catherine Creighton, an attorney, both on behalf of the Union, and Vespucci exchanged letters, the Union demanding "the names and addresses of all DuPont Niagara Plant retirees" and Vespucci rejecting that request. She consistently contended that she did not see its relevancy to the collective-bargaining process, expressed concern about the retirees' privacy rights, and pointed out that the Union did not represent retirees. The Union, conceding that it did not represent retirees,

argued that it nonetheless was entitled to such information under the Act because it was organizing a Christmas party and wished to invite former retired members and it did "not have a reliable means to contact retirees, which it wishe[d] to do in regard to their health benefits." Amplifying that claim, Creighton wrote that the Union was "entitled to bargain for its members' future retiree health benefits. Such negotiations relate to what retirees are receiving currently." Sometime around this series of correspondence, Koithan and Fleury orally asked Vespucci for the same information for the same reasons: the Christmas party and to conduct a survey to determine how the retirees' medical benefits impacted their retirement and "how they were getting along with what their experience was so that we could possibly put proposals together to change the future for ourselves." Respondent failed to supply the requested information.

Neither the General Counsel nor the Union contend in their briefs that the Union's desire to invite the retirees to a Christmas party was a legitimate one to base a conclusion that Respondent violated Section 8(a)(5). I conclude that a Christmas party had no relationship to the collective-bargaining process and that Respondent lawfully refused to comply with the Union's request for the information for that specific reason. The Union's other reason had to do with current employees' medical benefits when they retired; and the Supreme Court has made it clear, a holding that the Board has adopted, that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971). Accord: *Mississippi Power Co.*, 332 NLRB 530 (2000), enfd. in relevant part 284 F.3d 605 (5th Cir. 2002); *Georgia Power Co.*, 325 NLRB 420 (1998), 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061 (1999). Admittedly, the Union is not seeking the amounts and types of the benefits that retirees are afforded, but a survey, to assess whether, when the current employees retire, the benefits that are granted by Respondent will be sufficient. Thus, the Union had the right to ask for information which would help active workers protect themselves and permit them to make proposals for themselves and otherwise bargain intelligently. The only method of obtaining that information from the retirees is by obtaining their names and addresses, which become relevant and necessary. As such, the requested information should have been provided. *Union Carbide Corp.*, 197 NLRB 717 (1972); *Connecticut Light & Power Co.*, 220 NLRB 967 (1975), enfd. 538 F.2d 308 (2d Cir. 1976).

Respondent contends, however obliquely, that the information is confidential. The Board found in *Exxon Co. USA*, 321 NLRB 896, 898 (1996), enfd. mem. 116 F.3d 1476 (5th Cir. 1997), as follows:

> A union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests. As explained by the Supreme Court in *Detroit Edison* [*Co. v. NLRB*, 440 U.S. 301, 314 (1979)], "a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." Thus, in dealing with union requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any "legitimate and substantial" confidentiality interest established by the employer. It is also well settled that, as part of this balancing process, the party making a claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information. *Jacksonville [Area] Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). Thus, to trigger a balancing test, an employer must first timely raise and prove its confidentiality claim. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072–1074 (1995). Further, an employer possessing the information and refusing to disclose it on confidentiality grounds has a duty to

> seek an accommodation through the bargaining process. Thus, when a union is entitled to information about which an employer has legitimately advanced a confidentiality concern in a timely manner, the employer must bargain towards an accommodation between the union's need for the information and the employer's justified confidentiality concern. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991). [Footnote omitted.]

Respondent has not proved that the names and addresses of the retirees are confidential. Its brief states only: "[T]he Union wholly failed to address [Respondent's] concerns about the confidentiality of personal retiree data, making no counter offers to address this point." That is insufficient to meet the Board's "'legitimate and substantial' confidentiality interest" test. That is also insufficient to demonstrate that its claim of confidentiality is of such significance as to outweigh the Union's need for the information. Rather than blaming the Union for failing to make a counteroffer, Board law is also clear, as shown above, that it was incumbent on Respondent to bargain with the Union to seek an accommodation,[21] which admittedly Respondent did not do. *Postal Service*, 332 NLRB 635, 638 (2000); *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999); *Minnesota Mining and Manufacturing Co.*, 261 NLRB 27 (1982), enfd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

Other Requests for Information

On June 14, the Union requested the following: "Please specify all state and federal regulations that were considered in formulating the changes to the job descriptions and training schedules." On the same date, the Union also asked: "If sludge must be stored, state whether it will be stored as a hazardous material. If so, state where it will be stored . . ." Respondent wrote on July 18, answering the first question, "Applicable OSHA and NIOSH regulations," and the second, that the sludge would be "stored in drums or buggies on premises . . . in accordance with current practices."

Regarding the first answer, by stating "[a]pplicable," Respondent was referring to those regulations that it applied. Respondent should have specified them. I note that on July 25, the Union partially replied to Vespucci's letter; but, while it objected to many of Vespucci's answers, it was silent regarding this particular response. I do not view its failure to object as evidencing its satisfaction with the response. Respondent should have responded with the required specificity in the first instance. I find a violation.

Although the Union similarly had no objection in its July 25 letter to Respondent's second answer about where the sludge would be maintained, the question asked for more than what Respondent answered, which PACE staff representative Briggs understood as being stored in Building 44, as it always had been. The question also asked whether the sludge would be stored as a hazardous material. In order to represent the employees, the Union was entitled to that relevant and necessary information, inasmuch as it related to the employees' health and safety, whether or not the issue had been raised by the Union during negotiations. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995), citing *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29, enfd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

[21] Respondent could have offered to mail the Union's survey, thus not revealing any "confidential" information.

In connection with the move from the Building 425 warehouse to the Lockport Road facility, discussed above, Respondent told the Union at negotiations on June 14 that lithium chloride, lithium metal, and sodium metal were to be moved from the warehouse; and unit employees moved certain material in connection with that move. At the next negotiations, on June 19, also as recited above, Respondent advised that it would not be using the Lockport Road facility after all, due to the Town's ordinance prohibiting the transfer of chemicals through the Town. Vespucci further advised the Union that Respondent still intended to vacate the Building 425 warehouse at the end of June, that it would use "containers" for storage, that there would be "a lot of movement" of these containers, and that there would be opportunities for overtime for the movement of the containers. The Union asked what material had been moved to the Lockport Road facility. Vespucci was not certain, but believed that it may have been lithium chloride.

What followed was a fax, dated June 20, in which the Union wrote: "Please inform this Union in writing and by facsimile today of DuPont's plans regarding this hazardous material's return to and subsequent transfer from the current warehouse." Respondent did not reply that day, but at the negotiations the following day, June 21, Vespucci stated that "the materials have all been removed", that it was "behind us and we should now move forward," and that she did not "see the relevancy of this since it is over and done." She added that the material that was transported, lithium chloride, was not a hazardous chemical. The Union's later request in this meeting for "management's final response" was met with Vespucci's seeing "no further need for any discussion."

The difficulty with that reply was that her comments dealt only with the return of the lithium chloride from Lockport Road to Building 425. It appears that lithium chloride is not hazardous, but there still remained in Building 425 sodium metal and lithium metal, which are explosive if exposed to moisture; and they needed to be moved from Building 425. The Union was entitled to know of Respondent's moving plans, the "subsequent transfer from the current warehouse," which clearly included the sodium and lithium metal, not only because of those hazardous materials but also because of its fear that the employees might be in violation of the Town's ordinance by moving this material. I conclude that Respondent violated Section 8(a)(5) and (1) of the Act in this respect.

On June 21, the Union served another information request on Vespucci, partially relating to the material from Building 425 that was being returned to Respondent's site, to be stored in containers. The General Counsel correctly summarizes the request as asking for "information regarding the location of hazardous chemicals on the site, where spills, accidents, air emissions, ground water and surface water discharges had occurred, and records of these matters kept by Respondent, including documents relating to public agency involvement and private litigation." The Union began its request, as follows:

> The presence of environmental hazards in the workplace may directly impact the health and safety of the bargaining unit employees. In order to identify these environmental hazards and promote meaningful bargaining calculated to remove or reduce such hazards, please provide the following information for the period covering the last five years, unless otherwise specified.

It then asked for plot plans and drawings and blueprints which showed Respondent's property and asked for the locations "that currently contain, or have ever contained, or may contain contaminants and, more specifically—and these are the questions about which the complaint alleges were not properly answered:

4. For those locations . . . indicate

a. Where remediation has been completed.

b. Where remediation is actively underway.

c. Where remediation is planned.

d. Where remediation is underway or planned, provide (1) target levels of contamination reductions achieved, (2) planned and (3) contemplated.

6. Please provide copies of all summary reports, periodic progress reports, interim measures programs, corrective action programs, project summary reports, facility investigation work plans or similar documents, describing evaluation or remediation of contamination that have been submitted to any state or federal regulatory agency.

8. Please provide all Employer records of OSHA inspections including copies of citations, notices of proposed penalties, petitions for modifications of abatement date, notices of failure to abate and final orders of the Review Commission.

9. Please supply copies of all documents that reference in any way spills of chemicals at any location where members of the bargaining unit have or are now required to work. Such spills would include but not be limited to spills resulting from tank rupture or overfill, tank bottom leakage, leakage from above and underground lines, seepage from underground sewers, sumps and over or through curbed areas or rupture or leakage from any other type of vessel. Documents would include, but not be limited to internal audits, self-assessments, internal correspondence, reports of and correspondence with third parties including contractors, regulatory agencies and plaintiffs in legal actions.

11. Please supply copies of all documents that reference the extent of any contamination of groundwater and/or waterways by chemical and/or hazardous materials.

12. Please supply copies of all documents that reference in any way the release to the atmosphere of chemical or other hazardous materials. Documents would include, but not be limited to, internal audits, self-assessments, internal correspondence, reports of and correspondence with third parties including contractors, regulatory agencies and plaintiffs in legal actions.

13. Please supply copies of all documents describing the Employer's responses to all of the events described under items (9), . . . (11) and (12) above, including remediation efforts, progress reports of such efforts, remediation plans and timetables including related internal correspondence, and correspondence with third parties such as contractors, and local, state and federal regulatory authorities. Said documents would include, but not be limited to preliminary assessments, remedial investigations, feasibility studies summary reports, periodic progress reports, interim measures programs, corrective actions programs, closure plans, project summary reports, facility investigation work plans, compliance reports, notice of violation, consent decrees or similar documents describing evaluation or remediation of environmental contamination and associated correspondence that have been submitted to any state or federal regulatory agency.

More than a month later, by letter dated July 30, Vespucci replied. In response to item 4, she wrote:

> We will make the master environmental files, which contain information responsive to these requests, available for inspection by the Union. The Union can obtain the requested information from these files as easily as the Company can. The files will be made available from 8:00 a.m. until 5:00 p.m., Monday through Friday, upon appointment. To schedule an appointment, contact Paul Mazierski at X5496. A copier will also be made available for copying these documents.

Her response to items 6 and 11 were essentially the same. In response to item 8, she wrote: "These documents can be accessed on the OSHA website. Instructions on how to access this website are attached . . . . " Briggs testified that he went on to the website:

> I remember there was some copies of citations and inspection notices, I don't recall seeing notices of proposed penalties, I don't recall seeing – well, I couldn't find it, you know, petitions and modifications, abatement date, notices of failure to abate or final orders of review commission. That – that was part of it, I – I wasn't sure that all the information DuPont had would be on that website anyway, I had no way to put them two together.

In response to item 9, Vespucci wrote:

> Incident Investigation Reports are available for both the Terathane and Sodium areas. Those for Terathane can be found on the enclosed disk. Those for Sodium are in binders located in Room 101, Building 30. They will be made available for the Union's inspection by appointment Monday through Friday between the hours of 8:00 a.m. and 4:30 p.m. The Union will be able to obtain the requested information from these documents as easily as the Company can. To schedule an appointment, please contact Craig Walker at X5623. A copier will be made available for copying these documents.

Finally, her response to items 12 and 13 were similar to her response to item 9. Commenting that "[t]he Union can obtain the requested information from these documents [or files] as easily as the Company can," she referred the Union, regarding item 12, to annual reports regarding air emissions which were filed with the Department of Environmental Conservation, a New York State agency, in April of every year, which were maintained in one room of Building 38, and to another room in Building 82 regarding item 13. To schedule appointments, Respondent directed the Union to Walker.

Briggs believed that he would not be permitted on the site because, for negotiations, Respondent's representatives had escorted him from the gate to the meeting rooms; and so he designated Joyce Bunce, presently Union president, to review these files. She testified that she went to Building 38 twice in August and spent four to six hours in an attempt to locate the documents, but could not locate the precise material she was looking for, because there were about nine filing cabinets, each with four or five drawers, badly labeled and organized, with some files empty and documents out of chronological order. To the contrary, Mary Cedeno, an employee of URS Diamond, an environmental consulting firm which is responsible for maintaining DuPont's environmental files, testified that all file cabinets in the room were neat, labeled, and organized, with an index of the files contained in each cabinet drawer posted in the room. With respect to the files in Building 82, Bunce admitted that, without an appointment, she

"ran into" the room where the records were kept and took a quick look around, but never opened a file drawer and never spoke with anyone. Seeing the room essentially in the same condition as the one in Building 38, she "made the decision to take what [she] knew back to the council and, you know, re-discuss what we were going to do."

Both were truthful. Cedeno had an associate degree in waste management and could be expected to find the filing system well organized, with documents easy to find. Bunce, on the other hand, was a full-time employee of Respondent and had little comprehension of what to look for, including the indices of documents that were contained in each drawer. One would have thought that, at some point, she would have asked someone for help, but she did not. In any event, the fact that Respondent provided her access to a room of file drawers does not relieve Respondent of its duty to supply information. That duty is not met responsibly by forcing the Union to engage in Respondent's game of hide-and-seek, particularly when one of the rooms contained more than 13,000 documents. At the very minimum, Respondent should have had a representative present to help Bunce or it should have indicated which files contained the material that the Union had asked for and where to find those specific files. Instead, Vespucci left her to her own devices; and the fact that she could not find the documents, as to which Respondent makes no argument about their relevance, was Respondent's fault, not Bunce's. Similarly, Respondent's direction to Briggs to go on the OSHA website does not comply with the requirements of the Act. Although many people may be computer literate, not all are; and Respondent had the obligation to produce the requested reports, or print them from its website, rather than testing Briggs' computer knowledge.

Respondent's contention that the Union cannot dictate the form of its response to information requests is, no doubt, true in the abstract; but all its supporting legal authority involved employers who produced the requested information which the union could easily review and work with. Here, with one exception, there is no clear evidence that Respondent ever produced anything that the Union could even find. Regarding item 9, there was no credible or reliable testimony or evidence that the Union made any effort to look at the material that Vespucci stated was available. It may well be that the disk she enclosed contained the information sought in readily ascertainable form and that the binders in Building 30, to which Briggs testified that Bunce went, contained the material the Union sought. In these circumstances, regarding solely this item, I dismiss the complaint. In all other respects, Respondent violated Section 8(a)(5) and (1) of the Act by failing to produce the requested information.

As found above, with the announcement of the closure of the Terathane operation, the Union and Respondent reached agreement on May 9, on a window period for employees to volunteer to leave their employment and accept the benefits of Respondent's CTP, provided that they did so by May 30, when Respondent proposed to effectuate its plans for bidding on jobs. After May 9, the Union learned from the International Brotherhood of DuPont Workers, which represented the employees at Respondent's Waynesboro, Virginia plant, at which there was also to be a layoff, that Respondent had extended the window period there. The Union requested that the agreed-upon window period in Niagara be extended, and Respondent refused. That prompted the Union to request, by letter dated June 19, "the basis for the Employer's selection of the window period for the DuPont Waynesboro, Virginia site," as well as other information that went to the heart of that decision in Waynesboro.

Respondent contends that all collective bargaining is conducted on a site-by-site basis and that local management and the local union set the window period at Waynesboro, without contact with anyone at Niagara. The General Counsel relies on an exhibit which shows communications in mid-April from Respondent's corporate office, copies of which were sent to

Kober and Vespucci, about TPS, which Kober testified was the same as "enhanced CTP" and offers employees "the same benefits as CTP but it offers both the employee and the Company better tax . . . choices." The e-mails seem to indicate that the corporate office decided that TPS, as opposed to CTP, would not be offered.

There is nothing, however, that shows that, other than the offering of a benefit, or the refusal to offer a benefit, the local management did not have an independent right to bargain all other terms of that benefit. In fact, the CTP had been offered to the Union, which also represented the employees at the nearby Yerkes facility of Respondent; and the Union turned it down. Here, the Union accepted the offer of the benefit, agreeing to the specific dates for the employees to ask for their benefit. That the Union sought to renege on that agreement to delay the end of the window period does not make relevant its request to obtain information that might tend to show that, had it known, it might have made an argument, with no guarantee that its argument would have been accepted, that it should have had a longer window period.

Furthermore, there is nothing in the record to show that the conditions of employment at Waynesboro, including seniority rights and the scope of the layoff, were at all similar to those in Niagara. In fact, there is nothing to demonstrate persuasively that upper management made the critical decisions. Even the General Counsel's brief confirms that, arguing weakly that "there was evidence at the hearing to *suggest* that the ultimate decision in these matters *may be made* above the site level in Respondent's corporate structure." (Emphasis supplied.) The Union contends that it "*suspected* that the rejection of its proposal [to enlarge the window period] did not originate al the local level." (Emphasis supplied.) I find that there is nothing in the record to show that Respondent's position was inaccurate. Collective bargaining was conducted independently at each site. What happened at Waynesboro, or was reasonable there, therefore, has no bearing on what happened at Niagara. The information requested by the Union was irrelevant. I dismiss this allegation.

Respondent's Delay in Providing Information

The complaint also alleges that Respondent's delay in answering the Union's requests for information from the date of its June 14 request to July 18 and 30 (except for two items) and from the date of its June 21 request to July 30 (except as to another two items) was unreasonable. I agree. Despite the fact that Vespucci had all sorts of responsibilities, and no doubt was very busy, many of the requests were not burdensome and were capable of response, with no particular difficulty. In addition, if she was so busy, she should have assigned this task to one of the four or five other staff members of the human resource department and ensured that they accomplished it. Matters of safety to the employees must take precedence. In addition, in light of her response, referring the Union to examine files in various rooms on Respondent's site or referring the Union to a website, that certainly took no time to answer and could have been written in far less that the 40 or so days that it took her. It is axiomatic that Respondent is required by Section 8(a)(5) to produce relevant information in a timely manner. *American Signature, Inc.*, 334 NLRB 880, 885 (2001); *Postal Service*, 332 NLRB 635, 638 (2000). Its failure to do so violated Section 8(a)(5) of the Act.

On June 26, the Union requested, among other documents, the documents that were used in the bidding procedure that Respondent followed on May 30–31, the bidding procedure that Respondent had invited the Union to attend and that the Union had refused to attend, specifically, "all IJP forms submitted for the sodium jobs posted on May 30" and "all plant bids submitted in response to the unilaterally implemented plant bid procedure on May 30." Briggs testified that Respondent produced the documents "sporadically through the bargaining" and that all were not provided until, he guessed, "July 24th, 25th, somewhere in there." To the

contrary, Vespucci testified that she tendered the documents on July 10, a position which she maintained in a later letter. I have no reason to discredit her,[22] especially against the less than clear recollections of Briggs. I conclude that Respondent's compliance with the Union's request in 14 days was not an unlawful delay within the meaning of Section 8(a)(5) of the Act and dismiss this allegation.

The "Good-Faith" Impasse; A Reprise

The Union adds to the unfair labor practices that the General Counsel relied on to demonstrate that there could be no good faith impasse on May 30, the fact that there had been delays in the production of documents, unfair labor practices that made a finding of a good faith impasse unsupportable. In particular, the Union relies on Respondent's delay in producing the documents requested on June 14, noting that: "The questions regarding the job descriptions and job training were particularly relevant because of Respondent's closure of Terathane and reorganization of sodium." However, when the jobs were finally put up for bid, they were exactly the same jobs that had been in existence, without change. The job-training period, as shown above, continued to be applied as in the past (albeit not in exact conformity with the written agreement). Thus, there was no harm to the collective-bargaining process. Indeed, as I have found, the Union had ample time to negotiate everything, and yet stuck to its positions that it had to bargain issues of its own choosing and in its own order.

The Union also contends that Respondent's delay in producing various material pertaining to "health and safety" hampered its bargaining. Its brief recites:

> The Union was in the process of bargaining the prospective conditions of the plant, including the combination of job tasks, manning levels, work schedules and workers performing new tasks. The Union was concerned about the impact that Respondent's changes would have on health and safety. Because the Unions recently affiliated, the Union needed an audit of the conditions. The Union needed this information while bargaining was occurring, not after Responded implemented the changes.

Without more, and considering the fact that the jobs were not changed or combined at the time of the bidding, there has been no showing that bargaining was at all impeded by the unfair labor practices that I have found concerning the June 21 request. *Sierra Bullets, LLC*, 340 NLRB No. 32 (2003). Of equal, perhaps greater significance, Respondent correctly argues that the General Counsel determines the legal theory in an unfair labor practice case. The General Counsel did not contend that the bargaining was impeded by these additional unfair labor practices. Accordingly, the Union's contentions are rejected. See, e.g., *Teamsters Local 203 (Union Interiors)*, 298 NLRB 315 (1990).

[22] The minutes of that session state: "Management presented the Union with some information that they had previously requested in a June 26 information request, but was dated June 25, 2002. Management stated that this information is the bid sheets and the volunteer bid sheets." The reliance by the General Counsel and the Union on the word "some" to show that not all the forms had been submitted is unwarranted. Included in the Union's request for information were six other items, none of which appear to have been produced by Respondent that day. By producing all of the documents requested in the first two items, but not the other six, Respondent produced "some" of the documents.

The Union's Request to Inspect Respondent's Facility

Because the Union felt that Respondent's supply of information was inadequate and unwieldy, the Union decided to take another direction. By letter dated October 24, Briggs requested that Respondent "provide dates for experts hired by the Union to review safety issues addressed by the Union during negotiations and by the Membership. This would be a Plant tour of all areas of the Plant." Briggs credibly testified that, in addition to Respondent's failure to reply adequately to the Union's earlier requests, he wanted information regarding "safety issues [which] continued to come up [in negotiations]," such as moving "buggies" containing hot, molten sodium over pot holes in a floor or on uneven floors; stain leaks, evidencing the possibility of water contacting sodium and lithium, which might result in an explosion; employees performing jobs resulting in repetitive motion injuries; working with sodium which was extremely hot; structural failures, such as the collapse of a fan; and employees "falling out," or overcome by the intense heat of working with sodium. A tour by a expert would be helpful to the Union in formulating proposals for collective-bargaining, Briggs insisted, particularly because the Union had not had a long relationship with Respondent, the affiliation with PACE occurring only in May.

Respondent insists, on the other hand, that such an inspection is unnecessary, as shown by correspondence that followed the Union's request. Vespucci wrote on November 6 that Respondent had yet to decide whether the Union's request was "appropriate and/or necessary" and asked for information so that it could fully understand and consider the Union's position, including a specification of what safety concerns the Union was referring to, whether they had been discussed or raised during negotiations, who the experts would be, what their experience was, where the experts intended to tour, how long the inspection would take, and what would be done with the experts' report.

The Union's response of November 18 did not answer many of Vespucci's questions, but contended that it had the "right to represent [its] members by requesting that a union industrial hygienist have reasonable access to *ascertain the safety issues*" (emphasis supplied); and, for "the specific safety issues raised by the Union during negotiations," it mentioned only that

> The Union has raised numerous health and safety concerns since DuPont's announcement of its decision to close terathane and restructure sodium. For example, on June 14 and June 21, 2002, the Union submitted information requests on this subject. Beyond this response the Union does not see a need to specify further. If the Employer requests a further response, please supply legal support for your request.

Because Vespucci did not respond, the Union wrote again on February 3, 2003, advising that it had "arranged for its industrial hygienist to inspect the Niagara Falls Plant for informational purposes regarding the current working conditions and any health and safety issues that may exist" and requested access on Monday and Tuesday, February 17 and 18, 2003. The Union threatened the filing of "appropriate charges" unless Vespucci replied by February 5, either confirming these dates or supplying alternative dates. On February 5, Vespucci replied and stated that she had had insufficient notice and needed more information and needed to consult with counsel. She later submitted for discussion a number of previously asked questions which she believed the Union had not adequately answered, as well as some new ones. At a February 7 bargaining session, the Union answered many of Vespucci's questions and agreed to answer others of the questions before the desired inspection date of February 17.

However, following that meeting, on February 10, Respondent's counsel, Martin Idzik, wrote to the Union, declining to permit the inspection for a variety of reasons, including his belief that the parties should properly address safety issues by themselves without an inspection, that the parties could resolve their disputes without an inspection, that it was incumbent on the Union to call safety matters to Respondent's attention, and that Respondent had consistently resolved problems as soon as it could reasonably do so. In light of this rejection, on February 17, the Union announced that it would not furnish any more information to justify its inspection demand.

In *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied 477 U.S. 905 (1986), the Board reaffirmed that "health and safety conditions are a term and condition of employment about which an employer is required to bargain on request" and that "Clearly, health and safety data is relevant to [a union's] representation obligation," citing *Minnesota Mining Co.*, 261 NLRB 27 (1982). But the Board overruled *Winona Industries*, 257 NLRB 695 (1981), to the extent that it held that requests for access to survey for safety hazards are in the nature of requests for information and that access cannot be denied. Rather, it agreed that "an employer's right to control its property is a factor that must be weighed in analyzing whether an outside union representative should be afforded access to an employer's property," citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). 273 NLRB at 1370.

The Board held that the union had to make more than a mere showing that the information sought was relevant to its proper performance of its representational duties. That alone does not obligate an employer "to open its doors." Id. Instead, each of the two conflicting rights—the right of the employees to be responsibly represented and the right of the employer to control its property and ensure that its operations will not be interfered with—must be accommodated. The Board then established the following balancing test for determining whether an employer's denial of a union's access to its premises violated Section 8(a)(5) of the Act:

> Where it is found that responsible representation of employees can be achieved *only* by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternative means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access. [Id.; emphasis supplied.]

The genesis of the Union's request for access was its request for information resulting from Respondent's decision to cease the production of Terathane and to restructure the sodium operation. As found above, Respondent had not supplied information that related to the health and safety conditions at its facility. Complaints involving the safety conditions continued to be raised in negotiations by the Union, culminating in the February 7 meeting, where, among other matters, specific safety issued were raised about the uneven floors in Buildings 6 and 16, among other places. The employees alleged that hazards existed; management, particularly Kober, denied that the floors were uneven or denied previously being informed of the conditions.

There is sufficient evidence that the Union complained of dangerous conditions, and Respondent knew of them but either tried to avoid their existence or their seriousness or tried to avoid their being investigated by a trained expert, as the Union has requested. I conclude that

Respondent violated Section 8(a)(5) and (1) of the Act by refusing to permit such an inspection.[23] The proof was insufficient, however, that there was any need for the inspection based on the Union's recent assumption from NPEU of the representation of the employees. See generally *C.C.E., Inc.*, 318 NLRB 977, 978 (1995).

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I will order Respondent to remove from its files any reference to the unlawful documented discussion of Russell Koithan, dated January 8, 2002, and notify him in writing that this has been done and that the documented discussion will not be used against him in any way. I will also order Respondent to produce the documents requested by the Union, which Respondent failed and refused to produce. I will order Respondent to permit, under reasonable terms and conditions, which the Union appeared to accept, the Union's industrial hygienist to tour its plant for the purpose of reviewing health and safety issues raised by the Union in collective bargaining.

Finally, I will order a make-whole remedy for Respondent's mid-term change of its bidding procedures, refusing to permit its employees to change their bids once they know what jobs are available. This may present some problems in compliance: persons affected may no longer be employed, job positions may have changed, and the like. Essentially, what Respondent must do is reenact the bidding procedure to ensure that all its employees were given the chance, according to their seniority, to receive the jobs that they would have received, had Respondent not violated Section 8(d). Any employees who were harmed by Respondent's violation shall be made whole for any loss of earnings and other benefits, less any net interim earnings, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record,[24] including my observation of the witnesses as they testified and my consideration of the briefs and reply briefs filed by the parties,[25] I issue the following recommended[26]

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[23] The Board has rejected Respondent's additional contention that *Holyoke's* balancing test is inconsistent with the protection of employer property rights established in *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992). *Brown Shoe Co.*, 312 NLRB 285, 285 fn. 3 (1993).

[24] That portion of Respondent's motion, dated October 27, 2003, to place testimony under seal is granted, to the following extent. Pages 1106, beginning with line 10 to page 1113, line 23, were clearly intended to be confidential and certain questions were incorrectly included in the record. Instead, all the pages should be removed from the open Transcript and placed under seal. In addition, Kober inadvertently testified to financial figures on page 1070, lines 12–13, the sentence beginning with "But." That line, which reflects information not asked for, should also be removed from the open Transcript and placed under seal. That portion of Respondent's motion, dated October 27, 2003, to correct the Official Transcript, as amended on December 18, 2003, is otherwise granted, except as to all other matters to which the Union, in its response, dated December 14, 2003, and the General Counsel, in the footnotes of his motion to correct the Transcript, dated April 27, 2004, have excepted. The General Counsel's motion to correct the Transcript is granted, except as objected to in item 1 of Respondent's opposition, dated May 4, 2004, with the exception of page 1264, line 3, where I said "reaching," not "really getting." Specifically, the tape of the witness's testimony reflected by page 901, line 5–6, was listened to; and the transcript is correct. Finally, I reject both the General Counsel's and Respondent's requests to correct line 21 on page 875.

ORDER

Respondent E.I. DuPont de Nemours & Co., Inc., Niagara Falls, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing documented discussions or other forms of disciplinary warnings to its employees because they assisted Niagara Plant Employees Union (NPEU) or any other labor organization and engaged in protected concerted activities and to discourage its employees from engaging in these activities.

(b) Failing and refusing to bargain collectively and in good faith with Paper, Allied-Industrial, Chemical and Energy Workers, Local 1-5025 (Union) as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All employees at the Niagara Falls, New York plant excluding all salary roll employees in cost analysis, employee relations, medical and wage and salary evaluation groups, engineers, chemists, draftsmen, estimators and other professional employees, buyers, stenographic group leaders and private secretaries and further excluding all supervisory employees of the rank of supervisor and higher in rank who have the authority to hire, promote, discharge or discipline or otherwise effect changes in the status of employees or effectively recommend such action.

(c) Modifying its collective-bargaining agreement with the Union during the term of the agreement by refusing to permit its employees during job bidding to change their designation of the jobs that they wanted up until the jobs were actually filled.

(d) Failing and refusing to furnish the Union with relevant information requested by it and delaying in furnishing such information to it.

(e) Refusing to permit the Union's health and safety expert to tour its plant for the purpose of reviewing health and safety issues raised by the Union in collective bargaining.

(f) In any like or related manner restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[25] The Union's letter motion, dated November 24, 2003, to reject Respondent's letter filing of "corrections," dated November 19, 2003, is granted. Rather than a mere request to correct inadvertent errors contained in its principal brief, it contains substantive argument and amendments, directly prompted by arguments made in the briefs filed by the General Counsel and the Union. As such, Respondent should have asked for permission to file it, but did not. I deny the Union's motion in its reply brief to strike a certain comment contained in Respondent's principal brief. In any event, I have not credited that comment. I also reject Respondent's suggestion that: "in the unlikely event that this ALJ should find any violation of the Act that warrants consideration of a remedy, DuPont should not be punished for the dilatory conduct of the General Counsel and the Union." There has been no showing of dilatory conduct engaged in by anybody.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful documented discussion of Russell Koithan, dated January 8, 2002, and within 3 days thereafter notify him in writing that this has been done and that the documented discussion will not be used against him in any way.

(b) Adhere to all the terms and conditions of its collective-bargaining agreement with the Union, including permitting its employees during job bidding to change their designation of the jobs that they wanted up until the jobs were actually filled.

(c) Make whole its bargaining-unit employees, with interest, for lost wages and benefits resulting from its refusal on May 30–31, 2002, to permit its employees during job bidding to change their designation of the jobs that they wanted up until the jobs were actually filled.

(d) Furnish the Union with the following information it requested:

(1) A copy of the contract, dated August 11, 2001, between E.I. DuPont de Nemours & Co., Inc. and Inner Mongolia Lantai Industrial Co., Ltd. for the sale of DuPont's sodium cell proprietary technical information.

(2) The names and addresses of all its retired bargaining-unit employees.

(3) The information requested in General Question 3 and under Job Descriptions-Group II, item 4(l), in the Union's letter of June 14, 2002.

(4) The information requested in the Union's June 20, 2002 fax.

(5) The information requested in items 4, 6 (the second item so numbered), 8, and 11–13 of the Union's June 21, 2002 letter.

(e) Permit the Union's health and safety expert to tour its Niagara Falls plant to review health and safety issues raised by the Union in collective bargaining.

(f) Preserve and, on request, make available to the Board or its agents for inspection and copying all payroll records, social security records timecards, personnel records, and reports, and all other records necessary to analyze the amount of backpay due under this order.

(g) Within 14 days after service by the Region, post at its Niagara Falls, New York facility copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility

[27] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 11, 2001.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the portions of the record placed under seal will continue to be maintained under seal, except as to those portions which Respondent has withdrawn its requests that they be placed under seal.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 28, 2004

_____
Benjamin Schlesinger
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT issue documented discussions or other forms of disciplinary warnings to our employees because they assisted Niagara Plant Employees Union (NPEU) or any other labor organization and engaged in protected concerted activities and to discourage our employees from engaging in these activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Paper, Allied-Industrial, Chemical and Energy Workers, Local 1-5025 (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All employees at the Niagara Falls, New York plant excluding all salary roll employees in cost analysis, employee relations, medical and wage and salary evaluation groups, engineers, chemists, draftsmen, estimators and other professional employees, buyers, stenographic group leaders and private secretaries and further excluding all supervisory employees of the rank of supervisor and higher in rank who have the authority to hire, promote, discharge or discipline or otherwise effect changes in the status of employees or effectively recommend such action.

WE WILL NOT modify our collective-bargaining agreement with the Union during the term of the agreement by refusing to permit our employees during job bidding to change their designation of the jobs that they wanted up until the jobs were actually filled.

WE WILL NOT fail and refuse to furnish the Union with relevant information requested by it and delay in furnishing such information to it.

WE WILL NOT refuse to permit the Union's health and safety expert to tour our Niagara Falls plant for the purpose of reviewing health and safety issues raised by the Union in collective bargaining.

WE WILL NOT in any like or related manner restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful documented discussion of Russell Koithan, dated January 8, 2002, and within 3

days thereafter notify him in writing that this has been done and that the documented discussion will not be used against him in any way.

WE WILL adhere to all the terms and conditions of our collective-bargaining agreement with the Union, including permitting our employees during job bidding to change their designation of the jobs that they wanted up until the jobs were actually filled.

WE WILL make whole our bargaining-unit employees, with interest, for lost wages and benefits resulting from our refusal on May 30–31, 2002, to permit our employees during job bidding to change their designation of the jobs that they wanted up until the jobs were actually filled.

WE WILL furnish the Union with the following information it requested:

(1) A copy of the contract, dated August 11, 2001, between us and Inner Mongolia Lantai Industrial Co., Ltd. for the sale of our sodium cell proprietary technical information.

(2) The names and addresses of all our retired bargaining-unit employees.

(3) The information requested in General Question 3 and under Job Descriptions-Group II, item 4(l), in the Union's letter of June 14, 2002.

(4) The information requested in the Union's June 20, 2002 fax.

(5) The information requested in items 4, 6 (the second item so numbered), 8, and 11–13 of the Union's June 21, 2002 letter.

WE WILL permit the Union's health and safety expert to tour our Niagara Falls plant to review health and safety issues raised by the Union in collective bargaining.

_____

E.I. DuPONT de NEMOURS & CO., INC.

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901, Buffalo, NY 14202-2387

(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.